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CADWALADER'S CASES

BEING DECISIONS OF

THE HON. JOHN CADWALADER

Judge of the District Court of the United States for the Eastern District of Pennsylvania, between the Years

1858 and 1879

COMPRISING SOME RULING OPINIONS ON QUESTIONS OF

PRIZE AND BELLIGERENCY

Arising During the Civil War

TOGETHER WITH DECISIONS

IN ADMIRALTY, IN EQUITY AND AT COMMON LAW

Volume I

Pace ac Bello
Inter Cives et Inter Gentes
Salva Justitia Patria Salva
Jus Dixit

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PREFACE.

To offer these reports to the public at this late day requires some explanation. Inasmuch as their use as authorities will depend less upon the dignity of the tribunal from which they were uttered than upon the intrinsic merits of the decisions, something should be said to give the members of the profession an idea of their nature and character. The more important cases are treatises upon some intricate problems of the law, while the summary treatment that other questions receive indicates that true judicial efficiency which abhors prolixity. The author of these decisions, like many learned lawyers, was so deeply absorbed by the duties of his profession that he gave little thought to the preservation of any memorial of his work. Some of the cases in these volumes were edited by him and published in pamphlet form. A few of the later ones appear in the Weekly Notes of Cases, and two of the more elaborate are found in Brewster's Reports. To rescue from the oblivion of office files the great majority of them was a labor of years. The great number of important decisions that were delivered orally are gone forever. Judge Cadwalader rarely reserved his decision when he had mastered the facts, and the status of the proceedings was ripe for final judgment or decree. It is not exaggerating to say that when he wrote a careful opinion he exhausted for the time being the legal learning on that particular subject.

A few facts about his life may prove interesting to the profession. He was born in Philadelphia in 1805, and graduated from the University of Pennsylvania as an A. B. at the age of sixteen. He soon began to assist his father, General Thomas Cadwalader, in the management of the Penn

Estates, and his complete mastery of the details of the intricate title of the Proprietor's family is shown by the history of that title which he prepared at an early age and which has been recently published by William Brooke-Rawle, Esq., in the *Pennsylvania Magazine of History and Biography* (Vol. XXIII, p. 60).

He studied law with Horace Binney, was admitted to the bar in 1825, when still under age, and in 1830, at the age of twenty-five, became Solicitor of the bank of the United States. He thus very early won a large and active practice, the litigation in which the bank was involved being extensive and the subsequent proceedings growing out of its failure being almost interminable. This helped him to acquire that remarkable knowledge of the principles of commercial law which he afterwards demonstrated from the Bench, when called upon to administer the Bankruptcy Act of 1867. In this connection it should be remarked that his study of the Roman Law and familiarity with its great writers from Gaius to Pothier was such that he often went to it for precedents especially in questions of commercial law whereof the English Reports were strangely barren.

His researches into the Civil Law led him to discover and trace through Bracton the sources of the Common Law and wherein the relationship of the two legal systems that rule the civilized world consisted. This matter he had condensed into the form of a note on Bracton which unfortunately, however, was never prepared in form for publication.

Seventy-five years ago, and indeed until quite recently with the growth of corporation law, questions involving the law of real estate were perhaps the most important, as they certainly were the most difficult, before the courts, and his dockets show continual entries of actions in ejectment and partition. Unfortunately this branch of the law, in which his knowledge was profound, he had no opportunity to illuminate on the federal bench.

From 1830 until his appointment as judge in 1858, his office was practically a school of law. A succession of students

got instruction from him, many of whom afterwards rose to high rank in the profession.

The course of study, beginning with and never losing sight of Coke upon Littleton and ending with Smith's Leading Cases, shows the value he put upon the acquirement of a broad foundation of general principles, and indicates what view he would have taken of the modern case system. John Samuel, Esq., has written for the Law Association of Philadelphia and published in 1904 under the title, *John Cadwalader's Office,* an interesting account of the life and work of his students, showing the strong bond of sympathy that existed between him and them, both on the professional and on the human side.

Scarce a day's sickness interrupted his work, his capacity for which was remarkable, and his devotion to which, far from impairing his health, seemed to give additional vitality to his almost perfect constitution.

Always a firm upholder of the Constitution and an individualist of the Jeffersonian School of equal rights for all before the law, he felt it his duty to stand for Congress in 1854 at the height of the Know Nothing or Native American craze, when as in all times of popular excitement, the supporters of law and order have a thankless task, and constitutional principles count for little. He was elected by a very narrow margin and took his seat in the Thirty-fourth Congress, one of the most stormy in that controversial period.

Small as the opportunities are for a new member under the Committee system in vogue, he took an active part in the debates preceding the organization of the House and the election of the Speaker. Nathaniel P. Banks was not chosen until after months of wrangling, with the Free-soil Democrats holding the balance of power and first adopting that irreconcilable attitude to the rest of their party that culminated in the split which elected Mr. Lincoln and brought on the Civil War. On the great question of the exclusion of slavery from the Territories Mr. Cadwalader adhered to the strict legal view maintained by the great body of the Democracy as set forth in the Kansas-Nebraska Bill of the previous Congress, and in

his speech on the right of Congress to legislate against slavery in the Territories upheld the legal proposition that slaves were property which a citizen of the United States had the right to take with him and make use of within the area of what was the common property of all the States. To disregard rights recognized by the Constitution and the decisions of the Supreme Court was to him revolutionary and abhorrent. His mind, however, was not warped by the dry letter of the law and he took a part in advocating measures of public improvement, such as arsenals and navy yards, and the publication of the topographical Charts of the Western unsettled country. He fully realized, however, that the shifts and changes of political life with its inevitable tendency towards opportunism and the use of expedients and compromises was not his proper sphere of action, and he refused to stand for a second term, when his party was in the ascendant and his election was assured.

Probably no member of the Bar ever made a greater pecuniary sacrifice than he, in accepting President Buchanan's appointment to the Bench. His earnings were more than five times his prospective salary, which was grossly inadequate for the needs of his large family. His service on the Bench, beginning on April 24th, 1858, and lasting until his death on January 26th, 1879, included the greatest crisis in the history of the United States, and the painful years of reconstruction and political debauchery, culminating with the panic of 1873.

The decisions of Judge Cadwalader had an important influence on the legal controversies arising out of the Civil War. As a strict constructionist, it was supposed at the outbreak of the War, that he would be obliged to adopt the view that the Administration at Washington, had violated the Constitution in trying to coerce the seceded States. But no one felt more strongly than he the duty of the judiciary not to assume ministerial or administrative functions and to leave political questions to the co-ordinate branches of the Government. The Administration had become involved

in a tangle of inconsistencies by first refusing to accord to foreign nations the rights of neutrals and then proclaiming a blockade of all the ports of the seceded States, thus classing the secessionists in one breath as traitors, in the next as public enemies. How were the Courts to reconcile these conflicting attitudes?

In the first case of belligerency that came before him, that of United States vs. Greiner (Vol. I, p. 448), the decision of which was as he says, "more important than difficult," Judge Cadwalader was able to enforce the allegiance of a citizen of Georgia to the United States, an allegiance which he held to be paramount and compulsory upon every citizen so long as the Government was able to maintain its courts of justice in the revolted territory and thus afford that protection which is the foundation of the duty of allegiance. The really difficult *and* important problem remained, viz., that of the right of the Federal Government to treat all residents of the seceding States as public enemies. This was raised in the case of The General Parkhill (Vol. I, p. 479).

The political questions here involved were reconciled to the strictest view of what was constitutionally right and the decision, which was followed by the Supreme Court, did much to strengthen the arm of the Federal Government. However much the right to secede for the violation of the compact might be justly maintained and upheld by individuals, Judge Cadwalader showed that neither the judicial nor the executive departments of the Government could recognize such a right unless and *until* the *power* to do so was established by a successful revolution. The principles here laid down were necessary to the adjudication of all the prize cases that arose during the Civil War. In many that followed, such as The Elizabeth Ann (Vol. I, p. 511), The Enchantress (Vol. I, p. 525), The Meaco (Vol. I, p. 548), The Herald (Vol. I, p. 555), The Island Belle (Vol. II, p. 1), The Bermuda (Vol. II, p. 62), he gave force and clearness to the laws of prize, and enunciated for the first time many principles in regard to the duty of prize masters and obligations

to prisoners taken on prizes, etc., which were immediately accepted as basic and sound. On the instance side of the court many decisions were rendered on such questions as salvage, collision, wages of seamen, construction of charter parties, etc., which may be found of use to the admiralty practitioner.

Another great service rendered by Judge Cadwalader was his exposition and enforcement of the Bankruptcy Act of 1867, especially in connection with the extensive litigation resulting from the failure of Jay Cooke and the panic of 1873. These decisions which make up in bulk enough to fill two additional volumes of reports have not been included with these miscellaneous cases.

Certain other cases deserve special attention. The case of Winter *v.* Ludlow (Vol. I, p. 1) deals with the question of equitable assignments. The merits of the controversy were elaborately considered and an opinion written which covers the entire ground of assignments in equity and appropriation in favor of creditors as well as giving a history of the relations of bankers and factors and of commercial agency in general. Perhaps the most interesting question involved, however, was the method of bringing in as a party necessary to final decree one by whose act the complainants had acquired their right to sustain their suit subsequently to filing their bill. Judge Cadwalader recommended that it be done by an original bill in the nature of a supplemental bill. The clearness of perception and learning displayed in so easily determining a controversy which had baffled court and counsel for eight years in this his first important decision, firmly established his reputation. The case of Keene *v.* Wheatley (Vol. I, p. 343) is a complete review of the law of literary property and the subject of breach of confidence by employés. It established the principle of literary proprietorship independently of copyright as an existing property right until general publication was made. He showed further that even in that case a use put of such property by means of information obtained otherwise than through such general publication would be

restrained in equity. Two of the decisions stand out conspicuously for their analytic research into the extent and limitation of certain public functions. One is the case of United States *v.* Kochersperger (Vol. I, p. 479), which gives the history of the establishment of post offices and post roads and shows the growth and nature of that Government monopoly which is now used by socialists and other advocates of extended government ownership as an example of their theories in successful operation. The other is the case of Camblos v. Philadelphia and Reading Railway Company (Vol. II, p. 276), in which is prophetically shown the ample powers given by the Common Law for the regulation of rates and the two distinct rights of the railway, the one to a monopoly of tolls, being the charge made by it as *owner* of the line and trackage, the other, its right to a *reasonable* charge for transportation or transacting the business of a common carrier. As to the latter charge the law will protect the public against rebates or preferential treatment in the interest of any one class. In the course of the opinion these salutary words are used, "Arbitrary discrimination is, of course, illegal; and so is discrimination for the advantage or disadvantage of one person or of a select few. There can be no abatement for the advantage, direct or indirect of the company itself, or of its managers or officers, or agents or servants or friends" (p. 388).

In the case of the Attorney of the United States (Vol. II, p. 138), Judge Cadwalader gives a valuable exposition of the constitutional question as to vacancies happening during a recess of the Senate. It is one of the very few, if not the only, recorded judgment of a court on that subject.

A number of carefully considered patent cases are included and decisions on the revenue laws, the latter containing some important views on the interpretation of statutes.

A few lines from a letter written by Judge Cadwalader to the late J. Francis Fisher, Esq., giving his opinion of the legal abilities of Andrew Hamilton, and published in an article by Mr. Fisher, on that great Colonial lawyer in the *Pennsylvania*

Magazine, Vol. XVI, p. 20, may be applied with aptness to himself. He says of Hamilton, "His method of referring to authorities tests the depth of his research and the clearness of his judgment not less than the copiousness of his intellectual development. Ordinary lawyers work from authorities as their only source of professional knowledge. They thus work, as it were, from below upwards. But great lawyers look upon the same precedents from above downward, using them as the tests or as examples of rules or principles deduced from independent and higher sources of thought."

In describing the qualities of mind of Judge Cadwalader, Theodore McFadden, Esq., of the Philadelphia Bar, to whom is due the collection and arrangement of these cases, uses the following language:

"It may be said with propriety and in a sense strictly historical, that the impression left by his personality on his legal contemporaries, was that of an intellect not merely highly trained but possessing naturally extraordinary aptitude for the Law as a science. His most distinguishing feature was subtlety —a quality metaphysically distinguished by Coleridge from mere acuteness, as the endowment of thinkers. This high faculty and the superabundance of his learning and his never failing moral self control, made him, in the language of a contributor to the press notices appearing after his decease, 'More feared in argument than any other advocate in the profession.' We all know how character is, or seems to be, modified by circumstances: the advocate is often a different person from the Judge, as in the case of Lord Brougham and the great Erskine; but on the bench no difference could be observed in Judge Cadwalader. He was still 'feared' by those who reasoned carelessly and still admired by all who could appreciate his eminent intellectual qualities and attainments."

After calling attention to the importance of the decisions in public cases involving political as well as legal principles, made at a time and under circumstances entirely new in this country, Mr. McFadden adds as to the character of his own work.

"The purpose of the collection is not to present to the profession a strict series of reported cases, but rather a body of judicial reasoning upon subjects of great importance, deriving authority from the judicial function of their author. This is the primary object, apart from which grave difficulties would at this day arise in preparing the work as Reports. The decisions were published from time to time or filed in the handwriting of the Judge with no accompanying statement of facts or argument of counsel and with nothing upon the record except mere docket entries or pleadings which added but little in the way of interest or elucidation. In many cases it has been difficult to recover the dates even of the decisions. I think it may be truly said, however, that few opinions so little require extraneous matter for the full understanding of the issues involved. In general they are not merely exhaustive, but may be said, in a sense of their own, to begin at the beginning and stop only at the end. Amplitude of treatment and easy wealth of learning, not less than subtlety of disquisition, are their distinguishing characteristics, and they are so employed as to present the whole case to the mind of the reader in its best and most authentic shape. Kochersperger's case, for instance, reads like a chapter from history. It is a misfortune that we have no remains of opinions orally delivered in which both in matter and manner Judge Cadwalader was often seen at his best."

It has been thought well to append to Vol. II of these reports, the proceedings in the Circuit Court, and those of the Bar Meeting held in memory of Judge Cadwalader.

The work of collecting and editing these cases was due to the initiative and personal interest of one of his students, the late Brinton Coxe, Esq., and, as intimated, the actual performance and completion of the collection was entrusted to Theodore McFadden, Esq. Their publication, however, was not determined upon until some years after Mr. McFadden's work was completed. Mr. McFadden's scholarly attainments admirably fitted him for a labor of this kind, and such benefit as the profession may derive from this publication should be

attributed to his painstaking work and skillful arrangement, including such statements of fact and argument as he was able to prepare, as also the indices of the volumes. Mr. McFadden was not able to attend to the actual printing and revising of the work for publication, and therefore preferred that his name should not appear on the title page as being responsible for the final form in which the work is now given to the public. His death occurred on February 5, 1907, at a time when he was looking forward with interest to the forthcoming publication.

JOHN CADWALADER, JR.

Philadelphia, 1907.

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CIRCUIT COURT. 23D JULY, 1858.

EQUITY.

WINTER *v.* LUDLOW.

Appropriation in favor of creditors and the rights and remedies thereunder at law and in equity. Rights of holders and endorsers of bills of exchange. Commercial agency. Agency of bankers and factors defined and distinguished. What constitutes assignment for the benefit of creditors and the nature of the trust thereunder. Effect thereon when informally made and after an attempted revocation of ratification by one holding interdependent relations with the assignor as to the possession of funds covered by the assignment. Privity. Effect of a general letter of credit on the liability of party by whom it is given. Nature and effect of the answer in equity practice. Discovery. What interest of a party requires that he should be made a defendant in equity in the Federal courts before final decree. Effect of an interest acquired by complainants subsequent to filing bill upon proceedings to bring in, as a new defendant, the party through whom such interest had been acquired. Original bill in the nature of a supplemental bill, when proper. Process of the Federal courts, its scope, and to whom it should be directed.

1. A., residing and doing business in California, remitted gold and bills to B., residing in Philadelphia, through the instrumentality of C., residing in New York. B. gave to A. a general letter of credit authorizing the drawing of drafts upon him. Drafts were accordingly drawn and accepted by B. to an amount larger than the remittances. B. became insolvent and, afterwards, A. B. then made an unsealed and informal assignment to D., appropriating future remittances, first, to secure any balance due him, and his outstanding acceptances of A.'s drafts, and, secondly, of A.'s drafts upon him at sight and on time. Information was sent by letter of this appropriation by B. to A. and it received A.'s ratification in terms extending its operation to all funds lying in B.'s hands to his, A.'s, credit. The ratification was not received or dated until after the suit was commenced. Notice of the assignment was sent to the

complainants. Afterwards, and before the ratification by A., B., at the instance of C., to whom B. was largely indebted, but who as regards A.'s remittances was merely an agent for their transmission to B., revoked the assignment to D. and made a new appropriation in favor of C., by whom the avails of the remittances were applied in payment of B.'s debt to him. *Held*, that the appropriation made by the assignment was valid and subsisting from its date, and constituted, in effect, one instrument with the ratification by A.

2. At the time of filing the original bill, A. was a resident of California. He afterwards became a resident of the Western District of Pennsylvania. He was not made a party to the bill. On this ground objection was made to the entering of a final decree. *Held* that under the act of Congress of 28th February, 1839, the objection was well taken; that, as a resident of the Western District, he was amenable to process in a suit in equity directed to the marshals of both districts, and that under the circumstances of the case, the complainants having acquired a new or modified interest by his act of ratification performed after the filing of their bill, he could not be brought upon the record by mere amendment, but that the correct practice was by an original bill in the nature of a supplemental bill in which he was named as defendant.

STATEMENT OF THE CASE.

THIS was a suit in equity brought by Winter, Latimer & Co. and Johns Hopkins, citizens of the State of Maryland, against Robert McKinney Ludlow and Robert M. Ludlow, citizens of the State of Pennsylvania, residing in Philadelphia, trading under the firm name of Ludlow & Co. The bill alleges that the complainant, Hopkins, was the purchaser and holder, and the complainants Winter, Latimer & Co. the purchasers and endorsers of certain drafts drawn by S. Beebee Ludlow & Co., of San Francisco, upon Ludlow & Co., and accepted by them, to meet payment of which, and of other drafts drawn and accepted in like manner in the hands of various individuals, large amounts of gold and gold dust had been remitted by S. Beebee Ludlow

& Co. to the defendants, or their agents, for that purpose; and that other large sums for the purpose were then in the course of remitting and transportation. One such invoice is conjecturally stated as amounting to $150,000. Complainants averred that S. Beebee Ludlow & Co. appropriated the said gold and gold dust, or the proceeds thereof, as a fund in the hands of Ludlow & Co. for the protection and payment of the drafts, and that on receiving the same Ludlow & Co. acceded to said appropriation and were bound thereby.

The bill further alleges the failure in business of said Ludlow & Co. and their refusal to apply the remittances to the payment of the drafts; and it sets out that they had advised the complainants by letter that they had assigned all expected remittances to pay and satisfy, first, a balance alleged to be due by S. Beebee Ludlow & Co. to them; second, to pay the drafts accepted by Ludlow & Co. and such sight and time drafts as may have been drawn on them. It denies the legality of so much of the said assignment as provides for the payment of Ludlow & Co.'s alleged balance; but alleges that upon application to them they have not only refused to apply the remittances according to their original intention, but even partially to apply them, reserving the balance due them, according to the assignment, as to which they refused all information, concealing even the name of the assignee. It avers that, in consequence, complainants are deprived of all benefit under the assignment, and can have no recourse to the property, and that if the appropriation first made thereof be not faithfully carried out they will be in danger of losing the amounts of the drafts held by them or on which they are liable as endorsers.

The bill is filed on behalf of the complainants above named and of all other parties having like equities. It prays: 1. Discovery. 2. An injunction to restrain defendants, or other parties to whom the gold and gold dust may have been transferred or in whose possession it may be, from transferring. 3. For a receiver. 4. For an account between S. Beebee Ludlow and Ludlow & Co. to ascertain what balance is due Ludlow & Co. from S. Beebee Ludlow and its character, and if the court

should be of opinion that said balance should be paid to Ludlow & Co. out of said remittances then, first, to pay said balance, and then the said drafts, otherwise in full to the payment of said drafts. 5. That the court shall determine the respective rights of the parties. 6. General relief.

The defendants in their answer admitted having received remittances composed of drafts as well as gold and gold dust to the time of their failure, amounting to about $50,000. Admitted and produced assignment dated 1st September, 1851; admitted having sent notice thereof to the complainants; admitted a letter of credit given by them to S. Beebee Ludlow & Co. authorizing him to draw upon them, and the drawing and acceptance of drafts upon them including those held or endorsed by the complainants; admitted extensive business transactions with S. Beebee Ludlow & Co. They denied that any specific appropriation of the remittances had been made to meet the drafts; that there was any agreement or understanding to that effect between themselves and S. Beebee Ludlow & Co., or any promise, undertaking or expressed intention that they should be so applied. No accounts between themselves and S. Beebee Ludlow & Co. were produced, which was sought to be excused on the ground that they were running accounts on which S. Beebee Ludlow & Co. were always in debt to them, and that no entries were made after their failure and they could give no items. No correspondence between them was produced, it being avoided on the ground that it related chiefly to family affairs, S. Beebee Ludlow being the son of Robert M. Ludlow. They claimed that the course of business between them and S. Beebee Ludlow & Co. being simply to place the remittances to their credit in general account of their indebtedness, and such and no other being the understanding between the firms, the holders of the drafts had no lien thereon, nor any right to take them out of their hands or control; that the assignment of 1st September was void for various informalities; that it made no appropriation and conveyed no title, and that it had been cancelled by them within a few days after it was made on being advised of its nullity. As to remittances

since its date they had no knowledge, except that they were informed they had been attached at the suit of some of the draft holders.

It will be seen that the District Judge was early impressed with the insufficiency of the matter in denial in this answer, and with the importance of its admissions.

The original bill was filed 8th October, 1851. The answer on the 14th of the same month. On the 15th October the court appointed a master with power to appoint a receiver who was accordingly appointed. The duties of the master were to some extent superseded by an agreement of counsel, alluded to in the opinion, that certain testimony only should be reported to the Court. The proceedings were very voluminous. Repeated amendments to the bill were made, due in great measure to the necesarily imperfect knowledge of the facts of the case possessed by the complainants at the commencement of their suit. There was great difficulty in obtaining testimony from witnesses who were either actually or potentially parties, some of whom were at great distances. Attachment suits by others of the draft holders had been commenced in the State courts of New York and Pennsylvania against Beebee & Co., a New York firm to whom Ludlow & Co. were indebted, and to whom they had, to say the least, improvidently, transferred the remittances in payment of their debts after the assignment to Taylor of 1st September. It was desirable that these cases should be first determined. A difficulty existed from the non-joinder of S. Beebee Ludlow as a party defendant, and an attempt had been made to bring him in by simple amendment to the bill. At the hearing of 1858 it was objected that no decree could be entered unless he were first made a party. The consideration of this question forms the main subject of a separate opinion, that of 11th July, 1859, and is not the least valuable of the matters treated.

When Judge Cadwalader came to the bench in April, 1858, the questions in the case, intricate in themselves, were thus spread over an immense accumulation of documentary material. It was his habit, while giving the utmost attention to the argu-

ments of counsel, to read every paper bearing in the smallest degree upon the question to be decided. There is a tradition that his first act in this case was to have the papers, which filled a barrel, wheeled to his office. Labor of this kind to him, if not exactly pleasure, was certainly not formidable. It may be said that before he took the work in hand a decision had seemed almost hopeless—much more a decision that should elucidate and satisfy. The reader of the opinions will judge how far that result has been accomplished. No attempt will be made here to follow the case in detail or *seriatim*. The last results of the evidence and the arguments are ascertained and analyzed in the opinions in a way to render such an attempt, for any useful purpose, wholly superfluous.* In this as in most of the cases now published, no paper-books or notes of argument have come to the hands of the editor.

The points on which the case ultimately turned were two: 1. A special undertaking by the drawees that drafts drawn upon them should be honored and paid; in other words upon the effect to be given to their letter of credit to S. Beebee Ludlow & Co. 2. The appropriation made by the assignment of 1st September, 1851, with the notification thereof to the complainants and the ratification by S. Beebee Ludlow & Co.

Charles Ingersoll, for complainants.
De Witt C. Morris and *Leonard Myers,* for defendants.

11TH JULY, 1859. CADWALADER, J.

Ludlow & Co., of Philadelphia, gave to S. Beebee Ludlow, of San Francisco, a letter of credit, authorizing him to draw upon them to an unlimited amount. He drew from time to time, under this authority, selling his drafts upon them at San Francisco, and investing the proceeds in bullion, and in bills of

* It will be perceived that the opinions are not in the chronological order of their delivery. As they were so published while Judge Cadwalader was living, and presumably with his approbation, and as a change in this respect would involve some small textual alterations, it has been thought proper not to disturb them. The final decree of 1st May, 1861, is now added and published for the first time.

other drawers in California upon other drawees on the Atlantic side of the continent. He remitted by mail to Ludlow & Co. these bills of exchange endorsed by himself to their order. He shipped the bullion deliverable at New York to Beebee & Co., his receiving and forwarding agents, to whom he transmitted the bills of lading, with orders to send the several shipments to Ludlow & Co. at Philadelphia; and he advised Ludlow & Co., in every instance, by letter, that the bullion was thus transmitted to *them*. They received these remittances in bills and bullion, by every semi-monthly mail steamer; collected the amounts of the bills when due, crediting him with the proceeds; and caused the bullion to be coined at the mint, crediting him with the mint certificates of its product, as cash. These arrivals of the remittances of each description were thus credited in the same general account in which they charged their payments of his drafts upon themselves at maturity. After some time, his remittances having been of less value than the amount of his drafts upon them, and his account with them being largely overdrawn, they failed in business, and refused, from thenceforth, to honor his drafts. He continued to draw and remit semi-monthly, until the news of their failure was received at San Francisco, when he also failed, and ceased transacting business. He and Ludlow & Co. were permanently insolvent. If Ludlow & Co. had received all of his remittances, and credited their full avails, and had paid all of his drafts, he would, in the end, have been largely in their debt. Ludlow & Co. after their failure, but before the arrival of any of the remittances which came after it, subscribed an appropriation of these remittances, in the form of an unsealed assignment of them to W. Taylor in trust to secure the payment first of the balance due by S. B. Ludlow to themselves, and their outstanding acceptances of his drafts, and secondly of his drafts upon them at sight, and on time. If the avails of the remittances which afterwards arrived had been thus applied, there would, after payment of the balance due to Ludlow & Co., have been a large surplus for the holders of the accepted and other drafts. Before the arrival of any of these remittances Ludlow & Co.

wrote to S. B. Ludlow. informing him of the appropriation, and advising him to confirm it. When the first remittance reached New York, they wrote to certain of the draft holders, informing them of the appropriation, and stating its effect; and, not long afterwards, wrote to Beebee & Co., the receiving and forwarding agents at New York, informing them that it had been made. Ludlow & Co., moreover, endorsed bills of exchange which composed a part of the first remittance, making them payable to the order of Taylor as assignee. Taylor also endorsed them, describing himself as assignee; and sent them by mail to be presented for acceptance. After all these recognitions of this appropriation, and acts under it, when more than twelve days had elapsed since its date, and more than a week since the arival of the first of the appropriated remittances at New York, Ludlow & Co. cancelled the paper by which the appropriation had been made, and executed other papers, whose intended effect was to appropriate this remittance, and the remittances expected, in payment of a debt of their own to Beebee & Co., the receiving and forwarding agents of S. B. Ludlow, in the discharge of which he was not in any manner interested. Beebee & Co. desired and suggested this misappropriation of the funds. It was at first opposed by Ludlow & Co. But their opposition soon ceased; and they became, under an expectation of receiving pecuniary assistance from Beebee & Co., direct participants in the measures by which it was carried into effect. Ludlow & Co. while prosecuting these measures, wrote to S. B. Ludlow requesting him to destroy their previous letters to him, and, instead of remitting to Taylor, to remit, as formerly, to Beebee & Co. S. B. Ludlow, after the receipt of this communication destroyed Ludlow & Co.'s previous letters. His remittances had ceased before its receipt. He had, before its receipt, received intelligence of their previous appropriation of his remittances in the form of an assignment to Taylor, and had written a letter to them approving of it. He never, so far as appears, did anything manifesting a disposition to impair the effect of this letter of ratification. But, this letter was not written by him at San Francisco until after the present suit had

been instituted, and was not received until after some important proceedings in the suit had occurred.

The same draft holders who had been informed by Ludlow & Co. of the existence and effect of their appropriation to secure the drafts were complainants. An indorsee of some of the drafts of which they were payees was a co-plaintiff. When the bill was filed, there had, since the date of that appropriation, been three semi-monthly arrivals from California. The complainants may have suspected that the remittances received, in this interval, had been, in part, misapplied; but they do not appear to have known that the writing of appropriation had been cancelled, or to have suspected the character, or extent, of the intervening malappropriation which had occurred. Ludlow & Co. were the only defendants in the original bill. Its purpose was to secure the funds, and ascertain and enforce the rights and interests of the draft holders. The complainants asserted that, independently of the writing, the remittances had been expressly or impliedly appropriated for the security of the drafts; and even insisted that the drafts ought to be paid before the reimbursement of the balance due to the defendants in general account. But the bill was framed so as to render the appropriation made by this writing available for the security of the draft holders, if it was required, and so far as might be required for the purpose. The answer of the defendants disclosed the cancellation of the writing, without giving any information as to the remittances except so far as the avails had been actually credited by them to S. B. Ludlow in cash before their failure. It was, in many particulars, evasive, and manifested a disposition to suppress material truths as to the past, and conceal their purposes as to the future. A receiver was, therefore appointed; and the case was referred for investigation, under specified heads, to a master, who was authorized to take testimony and examine the parties. Pending this reference, the general replication was filed, Taylor was made a party defendant, and an order was made that the bill, as to him, should be taken as confessed. The master examined one of the original defendants upon interrogatories, and took the depositions of Taylor and

S. B. Ludlow as witnesses. The deposition of Taylor had been thus taken before he was made a party. Witnesses at New York and in California had been examined, and their depositions returned, and much documentary evidence had been adduced, when an agreement of parties was made, and reported by the master, that he should report merely the testimony taken, without making any other report. The evidence taken was returned accordingly, with his report.

The defendants, notwithstanding this agreement, objected, at the subsequent hearing, to any use of the testimony thus reported being made for the general purposes of the cause. This objection was overruled. On particular questions which arose, the court was of opinion that the original defendants having been partners in the transactions which were the subject of controversy, the examination of one of them could be used at the hearing, on the same footing with admissions in an answer, as evidence against both; also, that the deposition of Taylor, who, though a party had no interest in his own right, and against whom no decree was to be executed, could be read. When the suit was brought, S. B. Ludlow was beyond the jurisdiction of the court, and therefore could not have been made a party. The complainants allege that he is now a citizen of Pennsylvania, residing in the other district of the State. In order to make him a party, they have instituted proceedings of which the sufficiency for the purpose is contested. In consequence of these proceedings, his deposition can be used in the cause for a very limited purpose only; and perhaps ought not to be used at all. His deposition, that of Taylor, and the answers of the defendant who was examined before the master, might be excluded entirely from consideration, without affecting any result in the cause, as all the material facts are proved by the other testimony, and by the papers in evidence.

Portions of the bullion which arrived before the suit was commenced, and a small quantity which arrived afterwards, are alleged to have been arrested and detained at New York under foreign attachments, at the suit of draft holders interested in the present proceedings. Of course, no draft holder plaintiff in

an attachment under which any portion of the remittances in question may have been detained, can be permitted to participate in the benefit of any decree in this cause without accounting for the amount thus detained as an addition to the fund for distribution. But no competent evidence of the existence of any such attachment has been adduced, as yet, either in court or before the master. The remitted bills which arrived after the present suit was commenced, were taken into the custody of the receiver. All of the remitted bills which arrived before the suit was brought, and all of the remittances in bullion except such portions as may have been detained under attachments, passed into the hands of Beebee & Co., and were converted by them to their own use. They credited the avails to Ludlow & Co., in an account which exhibits all of the amounts misappropriated except those alleged as above to have been detained under attachments.

The subjects of controversy are, first, the amounts credited by Beebee & Co., to Ludlow & Co., on account of their debt to Beebee & Co.; secondly, the amount or value of such bullion as may have been detained under attachments through the defendant's omission to reclaim it, or so much of its amount or value as may be taken into account for the adjustment of equities among the draft holders in the distribution of amounts not attached; and thirdly, the fund in the hands of the receiver. The specific products of the remittances from which the first two subjects were derived cannot be traced. Cognizance of them is, therefore, to be taken with a sole view to the question of the personal accountability of the original defendants to the draft holders. But the third subject is composed of specific product of S. B. Ludlow's remittances which arrived after the present suit was instituted. This fund involves distinct considerations with reference to the question whether distribution of it can be decreed until S. B. Ludlow shall have been made a party.

Independently of this question, the case was very fully investigated, with an extended reference to authorities, in an opinion which, for a reason hereafter mentioned, was never formally read or filed, though its effect was orally stated in

court. The propositions of law and fact, directly or incidentally involved in it, are here abstracted as follows:

1. The defendants, having accepted some of the drafts in question, and having engaged, by the letter of credit, to honor the others, though principal debtors to the draft holders, were, as to S. B. Ludlow, *sureties,* whom he was under an obligation to keep indemnified against these liabilities, by seasonable remittances.

2. There was no direct original appropriation, express or symbolical, of the remittances for the security of the drafts. The draft holders, therefore, had no cognizable independent interest, in their own right, in the subjects of controversy.

3. Though there had been such a direct appropriation for the security of the drafts, the defendants would, on paying any of them, with funds of their own, have been entitled to reimburse themselves before applying any subsequently received avails of the remittances to the payment of other drafts. Consequently, the balance due by S. B. Ludlow to the defendants in general account, having arisen from such advances, must, at all events, have been first paid out of the funds which were the subject of controversy.

4. As between S. B. Ludlow and the defendants, his letters of advice, and other parts of his correspondence, his endorsement and transmission of the bills of exchange, and the shipment by him of the bullion to middlemen, with orders for its ulterior transmission to the defendants, had constituted an *appropriation* of the remittances to secure to the defendants the reimbursement of their advances, and their indemnification against liability under the acceptances and letter of credit. This appropriation had vested in the defendants the *qualified* interest only in the remittances, which was required for their intended *security.*

5. This *interest* was vested in them from the commencement of the transit of the remittances from California. It was independent of the *lien* which, for a like purpose of security, was an incident of the defendants' agency, but could not attach to the remittances until in their actual possession.

The appropriation, which thus took effect before such a mere lien could attach, continued, moreover, to operate after the lien might have expired. Thus, if their agency had been such that their *lien*, like that of simple bankers, would not have prevented S. B. Ludlow from drawing occasional cash balnaces to his credit out of their hands, and leaving their accruing liabilities for him unsecured, the *appropriation* would have enabled them to retain such balances for their security.

6. Subject only to this qualified interest of the defendants, the ownership of the remittances was in S. B. Ludlow, who, on payment of their advances, and of his accepted and unaccepted drafts upon them, so as to exonerate them from their liabilities on his account, could have revoked their agency, and resumed the possession of his remittances, including even that of the bills remitted with his endorsement upon them, if no rights of other persons had intervened.

7. The *duty* of the defendants, under their agency, to apply the funds, after the reimbursement of their advances, to the payment of his drafts, was coincident and co-extensive with their *interest* under the appropriation for their security. So long as they continued to honor, and punctually pay the drafts, they would, from the special character of their agency, or from the particular course of the transaction of its business, have been at liberty, if the balance of their account had, at any time, been in his favor, to use, as their own, such avails of his remittances, bearing interest, as they duly credited to him, in cash, or its equivalent. But this right ceased when they ceased punctually to honor his drafts. They were bound afterwards to apply the specific proceeds of the remittances remaining after the reimbursement of their advances, to the purposes of their agency alone.

8. Their inability, after their failure, to continue to honor the drafts, had, beyond this, no effect upon the rights or interests of the parties other than resulted from the non-payment of the drafts.

It did not prevent the original appropriation of the remit-

tances from taking effect, as intended, for the security of the defendants.

Had no letter of credit existed, S. B. Ludlow's account with them not been overdrawn, and his remittances, arrived and in transit, not been of inadequate value to secure their advances and liabilities, the *consideration of the irrevocability* of the intended security might, by the dishonor of the drafts, have so failed as to have justified him in countermanding the delivery to them of the subsequent remittances. But if he had not thus countermanded the delivery, or otherwise revoked the appropriation, it would, with its incidents, continue even then to subsist for *his* benefit, in order that the remittances might be turned to account for his profit, and their avails applied afterwards in the mode originally intended, to the payment of his drafts, notwithstanding their dishonor. *Other* persons, at all events, could not then, on account of the dishonor of the drafts, have contested the existence of the defendants' qualified interest in the remittances.

As, however, his account with the defendants was overdrawn, and their accrued and accruing liabilities for him were inadequately secured by the remittances, including those in transit, the relation betwen them of debtor and creditor had so been superadded to that of principal and surety, as to render him, independently of any effect of the letter of credit, incapable of revoking the appropriation of the remittances in transit, until the defendants' advances had been reimbursed, and other adequate provisions for their liabilities had been made.

The effect of the letter of credit was, at all events, notwithstanding the dishonor of the drafts, to render the appropriation, so long as any one of them remained unpaid, irrevocable by S. B. Ludlow without the defendants' consent. When the drafts were negotiated, value was obtained on the Pacific side of the continent through the use of the defendants' commercial credit and standing. Their engagement, in the letter of credit, to honor the drafts, had thus been an *executed* part of the consideration of the intended security. The defendants, in consequence of S. B. Ludlow's failure to make adequate and season-

able provision for their indemnification, would not have been suable by him for a breach of this engagement. He could not successfully sue for it without averring and proving that he had thus provided for their indemnity. But they were not, for this reason, the less liable to be sued for breach of the engagement by the parties to whom the drafts had been, on the faith of it, negotiated. The liability of the defendants, under this engagement, having been thus absolutely incurred, the consideration of the intended security could not *wholly* fail, whether they were, or were not, as between themselves and S. B. Ludlow, justifiable in afterwards refusing to honor the drafts.

9. A surety is entitled, in equity, to the benefit of every security which, even without his knowledge, the principal debtor may have given to the creditor; but the creditor has no such equitable right *of his own* to the benefit of a security which the principal debtor has given to the surety. The latter of these two propositions is peculiarly applicable where the surety is an agent, and the subject of his agency is also the subject of the security. When the relation of principal and surety, and that of principal and agent, are thus combined in the same parties, as was the case with S. B. Ludlow and the defendants, they may by *mutual* agreement, revoke such an appropriation as that in question, and make any new arrangement as to the subject of it, without the concurrence of creditors in the relation of these draft holders, and without any regard to the present or ultimate security of such creditors. While the relations between S. B. Ludlow and the defendants were such as they could thus, by mutual consent, revoke or modify, the circumstance that the remittances were, *as between these parties,* appropriated for the security of the *defendants,* vested no cognizable interest in the *draft holders.*

10. S. B. Ludlow having no right, against the will of the defendants, to take from them any part of his remittances without first repaying their advances, and exonerating them from liability to the draft holders, and the defendants being unable, without his consent, to apply the proceeds of his remittance remaining after the reimbursement of their advances, to any pur-

pose other than the payment of the drafts, the relations between him and the defendants were not revocable by *either* party, without the concurrence of the other, and, unless rescinded or modified, by his and their *mutual* agreement, enured *incidentally* to the benefit of all, or some of the draft holders, though *not in any right of their own.*

If it had, in any manner, become *relatively impossible* for S. B. Ludlow and the defendants to *concur* in any different arrangement for the disposition of the remittances, the draft holders could not be deprived of the benefit thus incidental to the original appropriation. This appropriation, though the draft holders were not privy to it, would then become cognizable in a court of equity, as an indirect security for their benefit. In order to prevent circuity of remedy, or work out equities of the original parties, or of parties derivatively interested, which could not be othewise reached, the security might then be rendered available for the benefit of the draft holders in a proceeding in equity at their own suit.

This might have occurred through the insolvency of S. B. Ludlow and the defendants, and the death of him, or of them, or such a judicial or conventional divestiture of interest in their lifetime, as would occasion an administration of the fund on the footing of a recognized insolvency.

The jurisdiction of the court might then be exercised at the suit of the draft holders, as a means of reaching equities vested not in themselves, but in the original parties to the appropriation, which could not be otherwise adjustable between their estates.

The mere insolvency of these original parties, without any divestiture of the former interests, gave, however, to the draft holders no such derivative right of suing.

Consequently, the present proceeding cannot be sustained at their suit, unless they acquire an interest in the subject of controversy through the appropriation for their security made by the writing which the defendants, for a time, acted upon, as above, but afterwards cancelled.

11. Between S. B. Ludlow and the defendants, as *parties* to

this writing, his ratification of it, operating retroactively to its date, gave to it the effect of his and their concurrent act of appropriation. The submission of it for his ratification having been thus acted upon, before any countermand of it can have been received by him, such a countermand, if any was ever sent, could not alter, or qualify this effect of it as a *concurrent* act..

If the destruction of their letters had, in any respect, involved this part of the case in obscurity, the rule of evidence as to the spoliation of papers would sanction the utmost latitude of presumption, on the point of doubt, in favor of the draft holders.

12. But, except between S. B. Ludlow and the defendants as parties to the paper, it was not operative as *his* act until his ratification. As to such intervening transactions with *other* persons as were not immediately dependent upon his potential ratification, its effect, therefore, was that of an act of the defendants alone.

13. Though neither he, nor the defendants, could, without the other's consent, have made an effectual appropriation of the remittances for any purpose *different* from that expressed in this writing, yet, an appropriation of them *for that purpose* might have been effectually made either by him alone, or by them alone.

If made by him alone it would, whenever made, have the same effect as if the remittances had been appropriated for that purpose when they left California.

If made by the defendants alone, it could only take effect in subordination to the requirements of the duties of their agency. They could not, without his authority, delegate the performance of its functions for any other than ministerial purposes; and could much less without his approval, substitute for it a trust permanently vested in another person. The confirmation of the writing in question by S. B. Ludlow, was, therefore, indispensable to its validity as an *assignment* of the subject of their agency.

But the defendants having a qualified interest of *their own* in the remittances, coincident and co-extensive with the *beneficial* purposes expressed in the paper, it would, in equity, though

never confirmed by S. B. Ludlow, have been effectual from its date, not as an assignment, but as a declaration by them of a trust attaching to the ultimate avails of the remittances, when they should be received in cash, or its equivalent. The effect of such a declaration of trust was to render the defendants, from its date, incapable of concurring, as they otherwise might have concurred, with S. B. Ludlow, in any different disposition of the remittances. Unless he or the defendants paid the drafts from other sources, no such different disposition could be made. While they were unpaid, the security for their holders in the surplus of the proceeds of the remittances that might remain after the reimbursement of the defendants' advances could not be frustrated.

As an equitable appropriation, this writing, therefore, took effect sufficiently for its intended purpose, through the original qualified interest of the defendants in the remittances. Upon this derivative support it rested until complete effect was afterwards given to it, as an assignment, by S. B. Ludlow's ratification. From its date until this ratification, as well as afterwards, the defendants thus had, under it, an interest which was cognizable in a court of equity.

14. The debts and liabilities which it secured sufficed, as a *consideration,* to support it without a *seal.*

15. As it imposed upon the draft holders no burden, and required of them no relinquishment of any right, or performance of any condition, in order to entitle them to the benefit of the security, their acceptance of its benefit was legally presumable without any proof of their actual assent, or even of their knowledge of the existence of the paper.

16. Had this been otherwise, and had the appropriation made by it been revocable by the defendants before it was acted upon or its existence made known, it nevertheless became irrevocable when they communicated its existence to parties interested, in a manner to induce reliance upon its availability, and acted upon it in other modes as an existing security.

17. The appropriation having taken effect, the subsequent cancellation of the writing, and attempted annulment of the

security which it had created, could not prevent or impair its continued operation.

18. As the writing, when ratified, became effectual as an *assignment,* and as the draft holders benefited by it were *creditors,* it was, in one sense, an *assignment for the benefit of creditors.* But within the meaning of the legislation of the State as to instruments of this denomination, it was neither an assignment, nor a partial assignment for the benefit of creditors. This legislation is not applicable to an assignment of what cannot be transferred at the assignor's option for the benefit of other creditors than the parties particularly secured. Here, though the draft holders had no previous interest in their own right, they would have derived incidentally the same benefit of the previous appropriation, if it had never been revoked, as was by this writing secured to them irrevocably. It created, therefore, no *new* security, so far as the interests of general creditors might be concerned. Had it never been executed, and had the defendants and S. B. Ludlow severally made general assignments for the benefit of their respective creditors, the funds in question could not, as we have seen, have been distributed as a part of the general estate under either assignment. The writing in question appropriated them in the very mode in which a court of equity would have made the distribution, *under such circumstances,* if no such writing had existed.

The writing, in whatever sense it may be denominable an assignment, being therefore unaffected by this legislation, the question whether the parties in the cause were not placed, by the writing, in such a relation of privity of interest as would have here excluded the application of these laws of the State, does not arise.

The opinion which has been thus, in part, abstracted, defined particularly the purposes of such a reference for an account, and report of distribution, as, according to the principles from which these propositions resulted, would have been ordered at once, if the cause could have been decided between the draft holders and the original defendants. But an imme-

diate decision of the cause, according to these principles, was prevented by the necessity for considering an objection which had been suggested—that a decree could not be made until S. B. Ludlow should have been brought into court as a party. This objection is the subject of present consideration.

S. B. Ludlow is not a person against whom, as a party, an enforcement of any decree by judicial process would be necessary. The question whether he was a necessary party, depended, therefore, upon the species of necessity which is determinable with a sole reference to the *right of contestation* recognized by courts of equity as belonging to every person who has an *interest* in the subject of controversy.

The act of 28th February, 1839, provides that where, in any suit at law, or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement, or other objection to said suit. Under this act a decree might have been made, without S. B. Ludlow as a party, so far as the amounts for which the original defendants were pecuniarily liable to the draft holders were concerned. But such a decree, if these defendants were still insolvent, might have been of little avail to the complainants. The question principally considered, therefore, has been whether under the act, or independently of it, the objection could be disregarded as to *the fund in the hands of the receiver.* Of this fund the resulting ownership is in S. B. Ludlow, who, if the complainant's case were fully sustained, has an option to

redeem the fund by payment of the drafts in question from other sources. Independently of this right, he has an interest entitling him to contest every allegation of the bill on which a decree in favor of the draft holders might be founded, and to avoid, if he can, the effect of the complainants' allegations, by introducing new matter. The act of 1839 does not sanction a decree that may affect such an interest unless its proprietor is before the court as a party. Shields *v.* Barrow, 17 Howard, 130; Coiron *v.* Millaudon, 19 How. 115, and Green *v.* Sisson, 2 Curtis, 177, show that the present case, as to the fund in the receiver's hands, must, therefore, be determined independently of that act.

In the Circuit Courts of the United States, in consequence of "the peculiar structure of their limited jurisdiction over persons," the general rule of equity practice, that all persons interested shall be brought in as parties, has not been applied without some qualification. Its unqualified application, in cases not within the act of 1839, would often divest these courts of their jurisdiction as it is defined in the Constitution and acts of Congress. Therefore, if a plaintiff has done all that lies in his power to bring every person interested before the court, a decree upon the merits may be made, though an interest exists in some person whom, as the resident of another State, the process of the court cannot reach, if the case may be *completely* decided as between the parties in court. But this relaxation of the rule has been admitted only where "the right of the party before the court did not depend upon the right of the party not before the court; each of their rights stood upon its own independent basis; and the ground upon which it was necessary, according to the general principle, to have both before the court, was, to avoid multiplicity of suits, and to have the whole matter settled at once." No exception from the rule has ever been allowed where the rights of the parties before the court are not separable from, and independent of, the rights of the person who is not made a party. In such a case there can be no adjudication affecting the subject of his interest. This appears from the case of Mallow *v.* Hinde, 12 Wheaton, 197 to 199, cited in

Shields *v.* Barrow, and in other decisions which might be mentioned.

According to these rules of decision, the objection of the want of S. B. Ludlow as a party prevented a decree from being entered in favor of the complainants. For any reason other than to facilitate an appeal from a decision in support of this objection, the court was not willing to dismiss the bill hastily upon the objection. As between the complainants and the original defendants, this fund had been rightly taken into the custody of the court for the purpose of preventing its malappropriation. There was no want of jurisdiction between these original parties; and at the stage of the cause at which the receiver was appointed, the objection of the want of *other* necessary parties would not have prevented his appointment. (See 12 Wheat. 198; 2 Russell, 149, 152; 3 Hare, 62, 63.) It might then have been expected that S. B. Ludlow, when apprised of the proceeding, would become a co-plaintiff. If, in an ulterior stage of the proceeding, the court found itself unable, without having him before it as a party, to make a decree upon the merits, the suggestion of the difficulty was by parties who did not support the objection upon any equity of their own. Whether a decree of dismissal could have been made at the instance of these defendants, without some provision for the future security of the fund in court, is a question which it was not necessary immediately to decide. The fund could not be restored to *them,* to be handed by them to Beebee & Co., under the wrongful acts of appropriation which have been mentioned, without permitting a palpable violation of honesty. Certainly, no decree, other than one in favor of the draft holders, would have been proper while there was any probability that, if the cause were retained, the impediment in the way of such a decree on the merits might be removed. In the above cited case of Mallow *v.* Hinde, an injunction against proceeding under judgments at law had been granted in an early stage of a suit in equity, in which the objection of want of parties finally prevailed. The necessary parties who could not be served with process were named Taylor and the Beards.

The Supreme Court said: "We have no doubt the Circuit Court had jurisdiction between the complainants and the defendant Hinde, so far as to entertain the bill, and grant an injunction against the judgments at law, until the matter could be heard in equity. And if it had been shown to the Circuit Court, that from the incapacity of that court to bring all the necessary parties before it, that court could not decide finally the rights in contest, the court, in the exercise of a sound discretion, might have *retained the cause,* and the *injunction,* on the application of the complainants, until they had reasonable time to litigate the matters of controversy between them and Taylor and the Beards in the courts of the State, or such other courts as had jurisdiction over them; and if then it was made to appear, by the judgment of a competent tribunal, that the complainants were equitably interested with the rights of Taylor, the trustee, and the cestuis que trust, * * * the Circuit Court could have proceeded to decree upon the merits. * * * Such a proceeding would seem to be justified by the urgent necessity of the case, in order to prevent a failure of justice. (12 Wheat. 198, 199.)

The court suggested its readiness to dismiss the bill without prejudice, founding the dismissal upon the want of S. B. Ludlow as a party, if such a dismissal would expedite an appeal from such a decision of the point. But the complainant's counsel intimated no desire of an immediate decision for this purpose. The cause was retained, therefore, with a suggestion, however, from the court, that perhaps it could not be thus retained indefinitely.*

At this period the belief was that S. B. Ludlow, as a citizen of California, and resident of that State, was not amenable to the process of the court. He had, however, as the complain-

* The practice in England, as Mr. Daniel states it on the authority of 2 Atk. 14, 3 Atk. 111, and 5 Bro. P. C. 504, is, not to dismiss a bill for want of parties immediately, when the objection is sustained, but to order the case thus to stand over. In Herndon *v.* Ridgway, 17 How. 425, a cause appears to have been retained twelve months before dismissal, for want of parties upon motion in an earlier stage of the proceedings.

ants allege to have been afterwards ascertained by them, become, in the meantime, a citizen of Pennsylvania, by having resumed his residence in the State, but in the *western* district. The complainants have since adopted measures for making him a party. An objection to the sufficiency of these measures for their intended purpose has been interposed. It is made, not on his own part, but on that of the original defendants. Nevertheless, it must be considered, so far as it involves the question whether he has been effectually made a party in the cause.

The complainants appear to have assumed that, as to S. B. Ludlow, the necessary proceeding is for the simple *addition* of a party by way of *amendment*. This is a mistake. The foundation of the right of suit in this case is the appropriation made on the 1st September, 1851, by the original defendants. But S. B. Ludlow had, as we have seen, a right of ratifying this act so as to make it his own. His letter of 14th October, 1851, which appears to have been his first adoption of it, was not written until after the original bill in this case had been filed. If this letter had not operated as a ratification, it would have constituted in itself a sufficient independent appropriation for the security of some, if not of all of the draft holders. Regarded as a ratification, its effect was to modify materially the character of the interest which had previously been equitably vested in the draft holders under the appropriation, as an act of the original defendants alone. Until thus ratified it had taken effect only as the declaration of a trust, attaching to these defendants' own interest in the ultimate proceeds of the remittances in their hands. It operated afterwards as an assignment of the immediate property in the remittances themselves upon a direct trust for the security of the draft holders.

Even if the necessity for the proceeding against S. B. Ludlow had not, in part, arisen thus from a material occurrence happening after the filing of the original bill, he could not regularly have been brought in as a party by way of simple amendment in so late a stage of the cause. When a cause, after evidence taken or a master's report made, has been heard upon bill, answer and replication, a new party who might, in an earlier

stage, have been added by amendment, cannot regularly be brought in otherwise than by supplemental bill.

But, a bill simply supplemental, or a supplemental bill in the nature of an amended bill, is a proceeding essentially different from that which must be instituted where parties have acquired, as the complainants had here acquired, a *new* or *modified* equitable or legal interest in the subject of litigation *after* the commencement of the original suit, or where the relation of defendants to the subject of controversy may be determinable, in part, by the effect of an *occurrence happening,*—or, as in this case, an *act performed,*—since its commencement. Such a new proceeding may, according to the circumstances of different cases, approximate, in its character, in various degrees, to that of an original bill; and, so far as a new party is concerned, may sometimes even become a bill entirely original. In 1 Eq. Abr. 2 (B.) pl. 1, reasons are given for the rule, which was recognized nearly two centuries ago, that a devisee cannot bring a bill of revivor, for want of privity, but must bring his *original bill.* When a new party is to be added in respect of such an interest as was in question in the present case, and the effect of the proceeding against him depends, or may depend, upon the effect of an act which, like S. B. Ludlow's ratification of the paper in question, has occurred after the former suit was brought, the bill, though *supplemental,* as to the *former* parties, is, as to *him,* an *entirely original bill.* This is distinctly apparent in Vice Chancellor Shadwell's opinion in Woods *v.* Woods, 10 Simons, 210, 213, a case which, much less than the present, required such a decision. He founded his opinion upon texts of Lord Redesdale's treatise which he quoted. The following additional passages may be cited from the 4th edition of the treatise. On pp. 72, 73, and 98, 99, Lord Redesdale specifies cases in which "the suit cannot be continued by a bill of revivor, and its defects cannot be supplied by a supplemental bill; but *by an original bill in the nature of a supplemental bill* the benefit of the former proceedings may be obtained." He says (p. 99): "This bill, though partaking of the nature of a supplemental bill, is *not an addition* to the original bill, but

another original bill, which, in its consequences, may draw to itself the advantage of the proceedings on the former bill." He had on pp. 63, 64, defined cases in which parties to the suit are able to proceed in it to a *certain extent,* though, from an event subsequent to the filing of the original bill, the proceedings are not sufficient to attain their *full* object, as when the subsequent event gives a new interest in the matter in dispute to any person not a party to the former bill, or, a *new interest to a party.* He observed, in effect, that, in such case, the defect may be supplied by a bill which is usually called a *supplemental bill,* and is, in fact, merely so with respect to the rest of the suit, though with respect to its immediate object, and especially against any *new party,* it has also, in some degree, the effect of an original bill. He says on pp. 72, 73; "There seems to be this difference between an original bill in the nature of a bill of revivor, and an *original bill in the nature of a supplemental bill.* Upon the first, the benefit of the former proceedings is absolutely obtained, so that the pleadings in the first cause, and the depositions of witnesses, if any have been taken, may be used in the same manner as if filed or taken in the second cause; and, if any decree has been made in the first cause, the same decree shall be made in the second. But, in the other case, a new defence may be made; the pleadings and depositions cannot be used in the same manner as if filed, or taken, in the same cause; and the decree, if any has been obtained, is not otherwise of advantage than as it may be an inducement to the court to make a similar decree." This passage was commented upon by Lord Eldon (9 Ves. 54, 55), in the case of a tenant in tail, who, upon the death of a preceding tenant in tail party to a suit in equity, succeeded to the right of suit, not as heir of the former party, but as remainderman, "claiming," as Lord Eldon expressed it, "by force of a new limitation, and not by succession." He thought the right of such a party to the benefit of the former proceedings, including the depositions, dependent upon such order as the court might make upon a view of the circumstances of the case. (See also 13 Simons, 287, 288; 2 Hare, 95, 96.) In the case in 10 Simons, from which Vice Chancellor Shad-

well's opinion has been quoted, a bill was filed against a trustee with power to sell, and a purchaser from the trustee, to set aside the purchase on the ground of fraud. The purchaser, after filing his answer, died. The plaintiff then filed against his devisees the bill which Sir Lancelot Shadwell denominated *original* as to them, though supplemental as to the trustee. The question was, whether the insertion by the pleader in the latter bill of nearly the whole of the contents of the original bill was, or was not, according to the rules of equity practice, objectionable. It would have been objectionable if the proceedings in question had been, as to the *new* parties, a continuance of the original proceeding. The Vice Chancellor decided that it was not objectionable, because the suit, as to them, was an entirely new one. It was, he thought, not less a suit newly brought as to them because the former proceeding was continued against the original parties. In our practice, a supplemental bill which, as to a new party, is an original bill, would, no doubt, be sustained if references to the contents of the original bill on file were so made as to incorporate the parts referred to, without repeating them at length. In the case which has been cited, the decision was, not that they *must*, but that they *might* be thus repeated.* The omission to repeat them would not render the substantial character of the proceeding less that of a suit newly brought against such a party.

The case thus decided was not one in which the point arose, as it here arises, upon an *act* of the new defendant *himself*, performed after the commencement of the original suit. The present case is, therefore, even more clearly that of a new suit against S. B. Ludlow, in respect of his act of ratification, than the case decided by Vice Chancellor Shadwell.

The proper character and form, in this respect, of a proceeding for the purpose of bringing in S. B. Ludlow as a party, having been thus determined, we may, before considering further the sufficiency of the particular measures which have been

* Since the decision the practice in England has been modified by statute and by orders in chancery.

adopted for the purpose, inquire whether the process of the Circuit Court for *this* district of the State can, in *any* mode, be executed for the purpose in the *other* district.

The compulsory exercise of the jurisdiction of the courts of the United States, through the execution of process by the marshals of the respective districts, may, where a State has been divided into two or more districts, depend upon the division of the State in which a party resides, or may be served with process. The marshal, where his authority has not been, for special purposes, enlarged by particular legislation, can "execute throughout the district" for which he has been appointed, all such lawful precepts issued under the authority of the United States as may be directed to him; but cannot go out of his district. The occasional consequent limitation of the *exercise* of the jurisdiction of the Circuit Courts is, however, not a limitation of the *jurisdiction* itself. This jurisdiction of the Circuit Courts never depends upon the district of a State in which one of her citizens resides or may be found. The jurisdiction, as to all persons, except aliens, depends upon *citizenship* alone of the respective States. In the present case, therefore, the question is not one of *jurisdiction,* but of its *exercise.* (See Wheat. 699; Pet. C. C. 491.)

Under acts of Congress now in force, there are States of which each constitutes a single judicial district. The other States are divided, each, into two or more districts. No State is divided into districts which are in different circuits; and no district is composed of parts of any two States. Under the judicial system of the United States, the relations within a State, of two districts into which it has been divided, are, for many purposes, different from the relations of each, or both, to the district of any other State. The differences depend as well upon considerations of uniformity in the exercise of jurisdiction, as upon those of the separate sovereignties of the several States, which require, for the one case, provisions not needed for the other. For some purposes, the several districts of a State are little else than divisions of a district composed of the entire State.

The general motives and purposes of the series of statutes which have organized the system, and regulated the course of procedure under it, have been consistent and uniform. The act of 13th February, 1801, by which the courts were temporarily reorganized, should not, however, be regarded as one of the series. If a deviation, or tendency to deviate, in some particulars, from their otherwise uniform policy may be detected in certain provisions of this act, the extreme shortness of the time during which it was permitted to remain in force, and the complete restoration of the previous system effected by its early repeal, furnish sufficient reasons to dismiss it from consideration under this head, and render any recurrence to the well-known historical causes of its repeal unnecessary.

The judiciary act of 1789 contained peculiar provisions as to Kentucky and Maine. These provisions have ceased to be in force; but their former motives require explanation. Kentucky, though a part of Virginia, was, under the provision in the constitution for the admission of new States, on the very point of becoming a separate State. As to her, the legislation was for her prospective condition of a State. Maine, though a part of Massachusetts, was territorially detached. So far as the course of procedure might be concerned, she was to be treated as a separate jurisdiction, in order that crossing and recrossing the intervening State of New Hampshire, in the service of process, might be avoided.

This act made Kentucky and Maine each a separate district. Neither of these two districts was made a part of any judicial circuit. The act conferred the jurisdiction of a Circuit Court upon the District Court of each of them, so far as this could be done without making it a Circuit Court. Eleven other judicial districts, created by the act, were composed, each, of one of the eleven States which had then ratified the constitution. These eleven States, as districts, were divided into three circuits, each composed of two or more such States as districts. The two other original States, having afterwards ratified the constitution, each of them was, in the year 1790, made a district, and annexed to one of the three former circuits. In 1792, under

an act passed in 1791, Kentucky was admitted as a State, without any immediate change in the provisions, concerning her, of the act of 1789. Vermont, having also become a State, was, in 1791, made a district, and annexed to one of the original circuits. There thus were sixteen judicial districts. Each of the fifteen States constituted an entire district, except Massachusetts, whose detached territory, constituting a separate district, was not a division like any of the divisions of States into districts which were afterwards made.

Lest a doubt should arise whether, under this organization of the courts of the United States, their process might not, in certain cases, run beyond their *jurisdiction,* the act of 1789 provided, or, as Judge Washington says, *declared* that no civil suit should be brought before either of the said courts against an inhabitant of the United States, by any *original process* in any other district than that in which he is an inhabitant, or in which he shall be found at the time of serving the writ. In the reported cases, the effect of this enactment has been considered with a sole reference to the constructive, or actual service of process beyond the limits of the State, as well as district, for which the court issuing it was held. These cases recognize, as independent of the enactment, the rule that a controversy is not cognizable by a tribunal which has *jurisdiction* of neither the *thing* nor the *person* against whom proceedings are directed. They regard the prohibition in the act as a measure of precautionary legislation to prevent a departure from this rule in the procedure of the courts of the United States. Toland *v.* Sprague, 12 Peters, 300; Picquet *v* Swan, 5 Mason, 35; Exp. Graham, 3 Wash. C. C. 456; 4 Wash. C. C. 54, 211; Allen *v.* Blunt, 1 Blatchf. 487, 488; Day *v.* Newark Co., *ib.* 630.

A suit in equity, in which the original process is a writ of *subpœna to appear and answer,* was, of course, included in this prohibition. In the Introduction to Crompton's Practice, published three years before the act was passed, this writ, as used on the equity side of the English Court of Exchequer, in imita-

tion of the course of proceeding in chancery, had been denominated "an original process in a civil action." It was perhaps the original process as to which the precaution of such an enactment was, most of all, necessary. As a process directed *immediately* to parties defendant, it differs from the original process in suits at law, which is directed to the marshal, sheriff, or other local officer by whom it is to be executed. In consequence of this difference from process *ministerially directed,* it was, at one time, supposed in England that service of a subpœna upon a defendant in Scotland, or even beyond the four seas, if personally made, would be sufficient. (2 Madd. Pr. 2d ed. p. 199.) The opinion was apparently sustained by reported cases. But upon examination of the Registrar's book, it was afterwards discovered that these cases had been misreported. A service of the subpœna made *beyond the jurisdiction* of the court which issues it, except in modes, and under circumstances in which it has, from time to time, been authorized by statutes, is now regarded in England either as an absolute nullity, or as an insufficient foundation for any process of contempt for non-appearance. (2 Simons, 544; 4 Paige, 429; 1 Molloy, 244, 245; 1 Hogan, 79, 131; 6 El. & Bl. 824, 825; and see the reports of the last case in 2 Jur. N. S. 787, and 36 Eng. L. & Eq. 179.) The same rule now applies as to service of the writ in Jersey, Guernsey, and the other Norman Isles, which are under British dominion, but in which English laws are not in force, and the jurisdiction of English courts is not exercisable. (Fernandez *v.* Corbin, 2 Simons, 544; see 4 Inst. 286; 11 Exch. Rep. 64, 67, 68.) A case reported as having occurred in the year 1781, shows, however, that at the date of the act of 1789, there was in England a contrariety of opinion upon the general subject. (2 Dickens, 587.)

While every State, except Massachusetts with reference to Maine, constituted still a single entire district, the act of 2d March, 1793, s. 6, enacted that subpœnas for witnesses required to attend a court of the United States, in any district, may run into any other district, provided that, in civil causes, the witnesses do not live out of the district at a distance greater than

one hundred miles from the place of holding the court. This, it is believed, is the only law of the United States which, for any purpose whatever, authorizes any process issued on behalf of a private party to cross the line of a State.

By an act of 9th June, 1794, "the State of North Carolina" was "divided into three districts, in which the district court of the said State" was to "be held at such times and places as" were "already ascertained by law" for the stated sessions of the court. The act defined the territorial extension of the respective districts. It created no new or distinct court. The judge, clerk, and marshal, a single officer of each denomination, retained respectively their former positions for the whole original district, of which the so-called new districts were thus divisions. An act of 1797 reunited them as a single district; but an act of 29th April, 1802, again divided the State into three such districts or divisions.

The same act of 29th April, 1802, divided Tennessee which had, in the meantime, been admitted as a State, into two districts. The court of each district was to be held by the judge of the former district in whose office no change was made; but the districts were not the less distinctly organized with a different clerk, marshal, and attorney of the United States for each. The subsequent acts as to Tennessee prior to one of the year 1822, which will be particularly mentioned under a distinct head, require no citation.

An act of 9th April, 1814, "for the more convenient transaction of business in the courts of the United States within the State of New York," divided that State into two districts. But there was no marshal in the State other than the former one officiating under his previous commission, until after the 3d March, 1815, when an act authorizing the appointment of a marshal for the northern district impliedly limited the official character of the former incumbent and his successors to that of marshal for the southern district.

By an act of 20th April, 1818, Pennsylvania was divided into an eastern and a western district, each separately organized, with a judge, district attorney, and marshal of its own; and by

an act of 4th February, 1819, Virginia was divided into two similar districts. These respective acts conferred upon the district court of the western district of each of the two States, in addition to the ordinary jurisdiction and powers of a district court, the jurisdiction of all causes, except appeals and writs of error, cognizable by law in a circuit court, subject to writs of error in modes respectively provided. The law dividing Pennsylvania contained an enactment in the words, "all actions, suits, process, pleadings, and other proceedings of a civil nature, except in cases of appeals and writs of error, commenced and pending in the district or circuit court of said district of Pennsylvania, in which no verdict shall have passed, or plea to the merits shall have been decided, and which, by law, should have been had or commenced in said district court of said western district, if the same had been had or commenced before the passing hereof, and where the parties shall not otherwise agree, shall be and hereby are continued over to the district court of the western district established by this act, and shall there be proceeded in with like effect and in the same manner as if originally had or commenced therein."

No other States had been divided into districts when the Supreme Court, at February term, 1822, under the authority of the act of 8th May, 1792, s. 2, prescribed "rules of practice for the courts of equity of the United States." A comparison of the acts which had thus divided five of the States indicates that there had not been any uniform system of legislation on the subject. The general purpose of these acts, indeed their sole purpose, had been a convenient partition of the judicial business within the respective States. An extinction of any part of the former business of the courts was not intended. So far as it had occurred indirectly through the provisions of the acts, it was a result of defective legislation. The result, perhaps, may not have been produced at all in North Carolina, where one marshal still officiated for the whole State. However this may have been, the result in New York, Pennsylvania, and Virginia was, that in suits at *law,* as the process could not be directed otherwise than to the marshal of the district in which

it was issued, it could not be *served* in another district of the State. Where the jurisdiction existed, its *exercise* was thus prevented in cases in which the defendants, though citizens of the State, did not appear, and could not be served with process in the district. For such cases, a partial remedy of this evil was provided by the above-mentioned act of 1839, and a complete remedy by an act of 4th May, 1858, which will be mentioned hereafter.

In the case of a subpœna to testify, the act of 1793 had been intended merely to sanction crossing the line of a *State* for the purpose of service of the writ upon a witness not living more than one hundred miles from the place of trial. After certain States had subsequently been divided into districts, the act, of course, authorized the service of it upon such a witness beyond the line of the district, but within the limits of the State in which it was issued, if a legislative authority for such a service of it was required. But in the case of a witness living within the State, more than one hundred miles from the place of holding the court, who has been served within the State, but out of the district, though service of the subpœna should be deemed regular, there cannot be an attachment if he disobeys its mandate. Whether the service of the subpœna would be deemed regular or not is, therefore, a question of little, if any, practical importance, and one which, in practice, can scarcely arise.

But the case of a subpœna to appear and answer in an equity suit is, in this respect, different in the courts of the United States. The difference has existed since the adoption of the rules of 1822, if not from an earlier period. The effect of the prior legislation which has been mentioned, upon the case of defendants in a suit in equity, citizens of the same State, but not residing or found within the same district of the State, had been different from its effect in suits at law.

The writ of subpœna to appear and answer in equity, as process directed immediately to the defendants themselves, has already been distinguished from original process *at law*. The subpœna differs in like manner from the subsequent processes of contempt for not appearing in obedience to its mandate, or

for not answering after appearance. These processes, of which the attachment is the first, are directed in England to the sheriff or other local officer. A marshal of the United States cannot execute one of these processes beyond his district. But it by no means followed that the process of subpœna, when issued by the Circuit Court for one of the districts of a State, could not, in any case, be served in another district of the same State. Until the promulgation by the Supreme Court of the rules of 1842, this process might have been served by *any person*. The rules of 1822 had not required that it should in any case be served by a marshal. The 8th of those rules merely required that it should be executed by a sworn officer, *or* that affidavit of the service of it when executed by any *other* person should be made. The 15th of the rules of 1842 is that "the service of all process, mesne, and final, shall be by the marshal of the district or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof." The subpœna, when there is no special order of the court, is, under this rule, in substance and effect *process directed to the marshal*, but it is not in *form* directed to the marshal. Other process is directed to him, and cannot be directed, even by the court's order, to any other person, except in the case in which he or his deputy is a party, as provided by the act of 1789. The distinction between such other process and the subpœna to appear and answer is recognised in the rule of 1842, which does not limit the court's power to direct that the subpœna shall be served by another person in this case alone, in which the marshal is a party. This power, under the rule, is exercisable, therefore, whenever its exercise may, in the opinion of the court, promote the ends of justice, conformably to the rules prescribed by Congress in organizing the courts and regulating their procedure.

We have seen that in England the service of such a subpœna out of the realm is not regarded as effectual, because the writ cannot run beyond the limits of the *jurisdiction*. But the process of subpœna always ran, throughout the realm, into its

territorial divisions, in which *ministerially directed* processes of the Court of Chancery, including the processes of contempt, could not be executed by any local officer to whom they might have been addressed. The subpœna was the former process to bring in a party to answer a charge before the King in Council (see Hale's Jurisd. H. L., pp. 7, 44), and was, for some remedial purposes, a usual process of the Court of Chancery as early as the reign of Edward III, when the jurisdiction of the court was beginning to show traces of a partial independence of that of the Council. (See the records in 1 Ro. Abr. 372.) The present equitable jurisdiction of the court, if not that which was thus exercised at that period, originated in it; and the process was indubitably the same. If a question could have arisen as to the *propriety,* there could be none as to the *power* of sending this original process into any part of the realm. (See 2 Burr. 856.) Chief Baron Gilbert (For. Rom.) appears to have thought that the subpœna to appear and answer had been adopted from the common law process to bring in a witness to testify. The subpœna to testify, like the subpœna to answer, cannot be served beyond the *jurisdiction* of the court which issues it. But it runs into every part of the territory which is *within* the court's jurisdiction. Thus, in Pennsylvania, when it issues from one of the courts of the respective counties, it runs into every county of the State. 2 Serg. & Rawle, 349.

The distinction between the process which is directed to a local officer, and the process of subpœna directed to the party, has been exemplified in England in the case of a defendant residing in one of the counties palatine. The peculiar jurisdiction of the court of equity of the palatinate is exercisable only "between parties dwelling within the same, and for lands there, and for other local matters." (Hales *v.* Daniel, Nels. Ch. 67, 68, 1 Ca. in Ch. 41; Moor *v.* Somersett, Nels. Ch. 51.) Thus defined, it is an exclusive jurisdiction. But if the suit is not of a local nature, or if any one party sued resides elsewhere, or if complete justice cannot, for any other cause, be rendered in that court, the Court of Chancery of England, or the Court of Exchequer on its equity side, has the jurisdiction. The legal

presumption is always in favor of the jurisdiction of the Superior Court until a case has been shown, *upon plea,* to be exclusively cognizable and sufficiently remediable by the local court. A subpœna to appear and answer in an equity suit in chancery, or in the Exchequer, may, therefore, be served in a county palatine. (Cheetham *v.* Crook, 1 McClel. & Y. 307; Egerton *v.* Derby, 4 Inst. 213, 12 Co. 114; Edgworth *v.* Davis, Nels. Ch. 66; Owen *v.* Holt, Hob. 77, 78; Lord Redesd. Tr. 224, 225, 4th ed., and the cases there cited.) But, independently of the statute 27 H. 8, c. 24, s. 3, and some other acts of Parliament, the Court of Chancery, if the defendant had not appeared, could not have issued an attachment or other process of contempt to be executed within the palatinate. The act provided that, after a day named in it, all process in every county palatine should be made in the name of the King by the person having the royalty, and should be tested in the name of such person. Under this enactment the process could not regularly be issued out of the Chancery in the name of the King, directed to the Sheriff of the county palatine. The practice was to issue out of the Chancery of England a writ in the name of the King, directed to the chief judicial officer* of the county palatine, requiring him, under the seal of that county, in the name of the King, to command the sheriff of the county to attach the defendant. (See Lord Cholmondeley's Case, cited by Lord Kenyon in 6 Durnf. & E. 73.) If the writ were addressed directly to the sheriff of the county palatine, it would, on motion, be quashed. (Bradshaw *v.* Davis, 1 Chitty, 374; and see Bracebridge *v.* Johnson, 1 Brod. & Bingh. 12.) The effect of British statutes of the present century has been to alter this practice as to the palatinates of Durham and Chester. But it was followed as to the Duchy of Lancaster after their enactment. Lord Kenyon thought that so soon as the writ of attachment, properly tested, had been made out in the county

* The writ was directed to the Bishop of Durham, who alone of the proprietors of the palatinates, had an appellate judicial cognizance of suits in equity in their courts. It was directed to the Chamberlain of Chester, and to the Chancellor of the Duchy of Lancaster.

palatine, and been delivered there to the sheriff, he became responsible directly to the Court of Chancery for his acts and omissions under it. The practice in the chancery, when obedience by the sheriff is to be enforced, is, however, to make an order upon the judicial officer of the palatinate to return the writ directed to him, and afterwards to make an order upon the sheriff of the county palatine to return the second writ.

In England these distinctions between the process of subpœna and processes of contempt have been matters rather of form than of substance. Judgment that the bill be taken as confessed cannot there be entered until the defendant, after appearance, has been proceeded against as in contempt for not answering. Consequently, the question of the regularity of the place of service of the subpœna has usually arisen upon a subsequent application for an attachment, when it has, for practical purposes, been resolved into a question whether the attachment could be executed there. If it could not, the regularity of the service of the subpœna had usually been a point of no practical importance.

But in the courts of the United States a different practice, which had prevailed in some of the States before the judiciary act of 1789, and had been followed under it in some of the circuits, was established on a uniform footing for all of them by the rules of 1822. According to this practice, if the defendant did not appear and file his answer within a prescribed period after the proper day for his appearance, the complainant, at his option, instead of proceeding by attachment, might "proceed to take his bill for confessed," or he might have a general commission to take depositions, and proceed to a hearing as if there had been an answer and replication. The rules of 1842, omitting the latter alternative, require that, at the bottom of the subpœna, shall be placed a memorandum that the defendant is to enter his appearance on or before the return day, "otherwise the bill may be taken pro confesso"; and provide for the entry of an order that it be so taken if he do not answer within a prescribed period.

The judiciary act of 1789 would thus have given cognizance

of the present case to this court; and the acts which have since divided the original district have neither taken the jurisdiction away, nor prevented its exercise. According to the practice recognized or established by the rules of 1822, and continued under those of 1842, if an equity suit was *properly brought in any district* against certain defendants, there could be no difficulty, doctrinal or practical, in the service of a subpœna upon other defendants, citizens of the same State, residing in another district of the State. Under the rules of 1822, this writ might have been served upon them by any person. Under the rules of 1842, there could be no difficulty in obtaining, in a proper case, a special appointment by the court of a person to make the service. After waiting the prescribed time to afford an opportunity for contestation by the party served, an order might, if he did not appear, be obtained, that the bill, as to him, should be taken as confessed. As no further decree, and no enforcement of any decree, would, as to S. B. Ludlow, be necessary in this cause, it might, after such an order, proceed against the other parties without further impediment under this head.

This, it has been said, would have been the practice in a case like the present, *properly brought* in the district in which the process was issued. In the present case, the question whether this was the *proper* district could have been attended with no difficulty. The principal, as well as the primary, cognizance of the cause was here.

But, in cases of a different character, the question which district was the proper one for the cognizance of an equity suit against defendants within the jurisdiction, but residing in different districts of the same State, must often have been attended with embarrassing difficulties. A simple rule would have been, that the filing of the bill in either district, and primary service of process within its limits upon any one defendant, should always vest the cognizance of the cause in the Circuit Court of such district. In an equity suit, however, the casual primary service upon a mere formal party, having an insignificant interest, or, perhaps, no interest whatever in his own right, might, under such a rule of practice, have taken away the right of adju-

dication from the court of the district in which the controversy would seem, in a particular case, to be principally cognizable. But the objection thus founded upon the contingent occasional occurrence of such a case was outweighed by considerations in favor of a rule of certain and uniform applicability. Therefore, a series of particular statutes, beginning in the year 1822, determined, according to this rule, the practice of the Circuit Courts for the several districts of the respective States of Tennessee, Alabama, Mississippi, Georgia, Iowa, Ohio, and Texas. The last of these particular enactments was in 1857. The first of them had been passed on 30th March, 1822. It enacted as to suits by citizens of the United States in the Circuit Court of the United States for either the district of East or of West Tennessee, against two or more citizens of the State of Tennessee, some of whom should reside in East and some in West Tennessee, that the plaintiff might cause the clerk of the Circuit Court in which he should elect to commence his suit to issue duplicate writs, one directed to the marshal of East and the other to the marshal of West Tennessee, which writs it should be the duty of the respective marshals to execute and return, and that, when returned, they should be docketed and proceeded in to judgment as one case only. A provision authorizing executions to run from one district of the State into the other was added. An act of 18th January, 1839, divided the State into three districts, and re-enacted the above provisions of the act of 1822, confining, however, its provisions to suits not of a local nature, but omitting the restriction which had confined their application to cases in which citizens of the United States were plaintiffs. The form of the acts passed, before 1839, as to Alabama and Mississippi, and after 1839, as to Georgia, Iowa, Ohio, and Texas, differed from the act as to Tennessee only in the degrees in which the language used in them, respectively, approximated that of a general act passed on 4th May, 1858, for the apparent purpose of regulating the practice, under this head, upon a uniform footing throughout the United States.

This general act of 4th May, 1858, is entitled "An act to provide for the issuing, service, and return of original and final

process in the circuit and district courts of the United States in certain cases." The first section enacts, "that all suits not of a local nature *hereafter to be brought* in the Circuit and District Courts of the United States, in a district in any State containing more than one district, against a single defendant shall be brought in the district in which the defendant resides; but if there be two or more defendants residing in different districts in the same State, the plaintiff may sue in either district, and issue a duplicate writ against the defendants *directed to the marshal* of any other district within the State in which any of the defendants reside, on which duplicate writ the clerk issuing the same shall endorse that it is a true copy of a writ sued out of the court of the proper district; and such original, and duplicate writs, so issued, shall, when executed, be proceeded on accordingly; and upon any judgment rendered in a suit so brought, process of execution may be issued and directed to the marshal of any district in the same State. And in suits of a local nature, where the defendant resides in a different district in the same State than the one in which the suit is brought, the plaintiff may have original and final process against such defendant directed to the marshal of the district in which he resides." The second section enacts, "that in all cases of a local nature, at law, or in equity, where the land, or other subject matter of a fixed character, lies partly in one district, and partly in another district within the same State, the plaintiff may bring his action or suit in the circuit or district court of either district; and the court in which any such action or suit shall have been commenced as aforesaid, shall have jurisdiction to hear and decide the same, and to cause mesne or final process to be issued and executed as fully as if the land or other subject matter were wholly within the district for which such court is constituted."

In suits which are within the enactments of this law, every case which can arise, in practice, under this head, appears to have been provided for. The provisions of the second section include, certainly, suits in equity as well as actions at law. The provisions of the first section likewise apply to suits in equity, if

the phrase "writ against the defendant directed to the marshal" includes the subpœna to appear and answer. Unless the phrase is interpreted so as to include this writ, the uniformity in the practice under the act throughout the United States which it appears to have been intended to secure, cannot be attained. This will be seen upon a recurrence to the above-mentioned particular statutes as to Tennessee, in the first of which, passed, as above, in 1822, the legislation in question originated. These acts were an adaptation to the Courts of the United States for Tennessee of a practice which appears to have been familiar in the courts of the State in suits in equity. (6 Yerger, 85.) Such suits must, therefore, have been within the intended application of the above-mentioned acts of 1822 and 1839 as to the districts of Tennessee. The words of these acts were not more applicable to suits of the kind than the words of the act of 1858. While Tennessee was a part of North Carolina, "an act for giving an equity jurisdiction to the superior courts" for the respective districts of that State, passed in 1782, had conferred upon them the jurisdiction previously exercised by the Court of Chancery under the British government. It enacted that, upon the filing of the bill, the clerk should "issue a writ of subpœna as is usual in cases of chancery," or, upon a special order of a judge to hold the defendant to bail, should issue, for this purpose, a writ in a prescribed form, directed to the sheriff. "Upon such writ, or subpœna being duly served, and a copy of the bill delivered in proper time, proof being made to the satisfaction of the court, by return of the sheriff, or by affidavit, the defendant" was to "appear, and put in his answer, or plea, agreeable to the practice in chancery, or demur, or, on failure thereof, the plaintiff's bill" was to "be taken pro confesso." The subpœna in equity seems to have been regarded, in some of the States, from a period prior to the judiciary act of 1789, and, in some of the circuit courts of the United States, from a period long anterior to the adoption of the rules of 1842, as process directed, in the State courts to the sheriff, and in the federal courts to the marshal. A statute of New Jersey, passed on 13th June, 1799, enacted "that it shall be the duty of the *sheriff*,

or coroner, as the case may require, of any county in this State, to whom any *subpœna,* order, attachment, process of sequestration, writ of execution, or other process issuing out of the court of chancery shall be *directed* or *delivered,* to *serve,* or *execute,* the same, and to make return thereof at the time and place therein mentioned, which shall be filed by the clerk"; and "that every subpœna, or process for appearance shall be *served* on the person to whom it is directed, or a copy thereof left at his dwelling house, or usual place of abode, at least ten entire days prior to its return." In this act, the subpœna, though, in form, directed to the person to be served, is classed with process ministerially directed. From the case of Kennedy *v.* Brent, 6 Cranch, 191, it may be inferred that in the Circuit Court of the United States for the Eastern Dirtrict of Virginia,* the practice, adopted from that of the State, was, in the year 1810, that the subpœna in equity might be served by any person, but that its delivery to the marshal to be executed imposed upon this officer a duty to serve it not less obligatory than if it had been formally directed to him. Its delivery to a sheriff in England imposed no such obligation upon the sheriff.

If the act of 1858 had been passed before the adoption of the rules of 1842, the writ of subpœna to appear and answer in equity could not, however, in *this* court, have been regarded as process *directed to the marshal,* in any sense in which the phrase could have been understood *here.* But even here, the process may, *under those rules,* be understood as one of this description. The rules having been promulgated under the authority of an act of Congress, have, in some degree, the force of statutory regulations. They provide, as above, that the service of all process in equity, including the subpœna, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court. Independently of the act of 1858, when an order for service by another person is not

* The case occurred in that portion of the District of Columbia which had been ceded by Virginia. The opinion of Marshall, C. J., and the decision of Chancellor Wythe, cited in the argument, sustain the inference stated.

applied for, the process cannot, under the rules of 1842, be served otherwise than by the marshal of the district, or his deputy. In such a case the record of the proceedings may, with great propriety, recite the filing or exhibition of the bill, and, after setting it forth, state that process of subpœna was thereupon awarded and issued, to be served by the marshal of the district, or by his deputy. The writ also might, with equal propriety, be endorsed by the clerk, at the complainant's instance, that it was to be served by the marshal, or his deputy, according to the rules. (See 6 Cranch, 189.) With or without such an endorsement, the subpœna appearing by the record to have been thus awarded, is, as has already been suggested, in substance and effect, under the rules of 1842, process *directed to the marshal.* In the case of Allen *v.* Blunt, 1 Blatch. 487, 488, Judge Nelson appears to have thought that, in the absence of everything like such an entry of record, or endorsement, the subpœna could not be regarded as process directed to the marshal. In that case the question was, whether service of a subpœna, in equity, upon the defendant, appeared by the marshal's return to have been made in the district of Massachusetts. The return did not state *where* it had been served. Judge Nelson, remarking that the fact of the service upon the defendant in the district of Massachusetts rested wholly upon the subpœna and return, said: "The writ of subpœna is not *directed to the marshal* for anything that *appears in the record;* and the return speaks of the service of a *notice* upon Blunt, which might very well refer to the memorandum accompanying the subpœna, directing that the appearance of the defendants must be entered on or before the return-day of the writ, or the bill would be taken pro confesso." These observations would seem to import that, though the subpœna is, in the body of it, directed to the defendant, and not the marshal, yet the record of the proceeding under which it has been issued, and is to be served, *may* contain what renders it *process directed to the marshal* by whom it is to be served, and whose return is to attest the service.

Under the act of 1858, a bill averring the residence of the

defendants in different districts of the State, might very properly pray that the process, in duplicate, should be awarded for execution by the respective marshals, according to the provisions of the act. The clerk, in making out the record, would then very properly set forth an award of process accordingly; and he might endorse the duplicates of the subpœna with a direction that service of it by each of the respective marshals be made upon the defendants residing in his district. Each duplicate would thus become process directed to the marshal of one of the districts. These formalities might, perhaps, all, or some of them, be dispensed with, leaving the act of 1858 and the rules of 1842 to define their own effect. The ascertainment of their effect is, however, facilitated by stating thus a case of the fullest compliance with such formalities.

This act of 1858 may, therefore, be interpreted as applicable to a suit in equity.

Had it been interpretable as a measure entirely of intended new legislation, and *thus* applicable to suits in equity, it would show that, in the opinion of Congress, the subpœna in equity did not, in any case, run out of the district in which it was issued into another district of the same State. The circumstance that the act, in express terms, is limited in its application to suits *brought after* its enactment, would then have added force to this argument. In part, the purpose of the act was to remedy absolute defects in the previous legislation. Thus, in certain States, including Pennsylvania, it restored, in suits at *law,* the *exercise* of the jurisdiction on a footing as extended as before any division of the respective States into districts; and rendered the practice in them the same as that already established, by particular acts, for Tennessee and certain other States. But its purpose was also to settle the practice under other heads, according to rules applicable alike in all parts of the United States. We have seen that although, before its enactment, the subpœna from a district in which a suit in equity was *properly* brought, might have run into another district of the same State, yet the question, in *which* of two districts of a State the cause was properly cognizable, might often have been involved in

embarrassing uncertainty. Under the act, the residence of *any one* defendant in either district in which the bill may be filed, suffices always to determine the question and sustain a service of process in the other district. The act thus furnishes as to suits in *equity* a uniform rule of proceeding, where the practice might otherwise have been uncertain and variable.

This law certainly contains enactments which are *not* new. Its first enactment, that all suits not of a local nature, "in a district in any State containing more than one district, against a *single* defendant," should be brought in the district in which he resides, is clearly declaratory. It, moreover, attracts attention from the omission of any such provision, in express terms, for the case of a suit against a plural number of persons, all residing in the *same* district. The latter case, and the case expressly provided for, do not seem, either of them, to have required statutory regulation. Again, a general act of Congress, passed on 20th May, 1826, had enacted that all writs of execution upon any judgment or decree obtained in any of the District or Circuit Courts of the United States, in any State which had been, or might thereafter be, divided into two judicial districts, might run and be executed in any part of such State, but should be issued from and made returnable to the court where the judgment was obtained. Notwithstanding this general enactment, the act of 1858 has re-enacted its provisions. They had in like manner been unnecessarily re-enacted for Tennessee in 1839. Their original enactment for Tennessee in 1822 had, however, been a useful provision for that State, at *that* period.

This repetition in the act of 1858 of the general enactment of 1826 as to executions, the general conformity of the provisions of the act of 1858, concerning original process to those of the prior particular laws which have been mentioned, and the mode above defined in which the act of 1858 applies to suits in equity, show that this act was not intended as an entirely new measure of legislation. Therefore the argument that the act, if applicable at all to suits in equity, manifests an opinion of Congress that the subpœna could not, before the act, have

been served, in any case, in another district of the same State, cannot prevail.

To recapitulate. The act of 24th September, 1789, divided the United States into judicial districts, with a sole reference to the *jurisdiction* of the respective courts which it created. Process directed to a marshal could not be served beyond the limits of his district. He could not have crossed its line in serving the process, if nothing on the subject had been contained in the act. But the subpœna to appear and answer in equity was not, in form, or in effect, process directed to the marshal. At the date of the act, opposing opinions were entertained upon the question whether in England such a writ could be served beyond the limits of the *jurisdiction*. That no doubt upon this or any similar question might be entertained in the practice under this act, the 11th section provides that no *civil suit* shall be brought against an inhabitant of the United States, by any *original process* in any other district than that of which he is an inhabitant, or in which he shall be found at the time of serving the writ. This enactment was applicable not less to the subpœna, than to process—ministerially directed. But its only effect, at its date, was to prevent the boundary of a State from being crossed in the service of original process of either kind. Under this act the former defendants, and S. B. Ludlow, could have been served with process at law or in equity, in the same suit. The intended effect of the act which afterwards divided the State into two districts was a mere partition of the jurisdiction conferred by the act of 1789 between the courts of the two infraterritorial divisions. That these two acts, in their combined effect, prevented, *in any case,* the exercise of this jurisdiction where it had before been exercisable, was the result of an oversight in legislation since remedied. Where it occurred, it was not a direct consequence either of the prohibition in the 11th section of the act of 1789, or of any enactment in the law dividing the State. It occurred in suits at law when compulsory process was required against necessary parties residing in different districts of the same State, because the process in such suits could be directed to the marshal only.

But when a suit in equity was brought against such parties, the subpœna, being directed immediately to themselves, could be served upon them all. The act of 1789 fulfilled its office in rendering service out of the district ineffectual, when, in order to make the service, the boundary of the State, or original district, was crossed. The rules of 1822, and the previous practice in some, if not in all parts of the United States, dispensing with processes of contempt, enabled the complainant, without issuing any writ ministerially directed, to obtain, as to such defendants as did not appear, an order that the bill should be taken as confessed. It was questionable whether a complainant could, under this practice, have claimed an arbitrary option to proceed in either district of the State, without reference to the question in which district his cause was the more properly cognizable. Particular acts of Congress, however, gave him this option in certain States, in suits both at law and in equity. The rules of 1842 gave to the courts in Pennsylvania and other States to which no such act applied, a control in this respect of the proceeding by preventing the service of process in equity otherwise than by the marshal of the district, unless a special order was made authorizing the service by another person. When there was no such order of court, the subpœna became, under these rules, in substance and effect, process directed to the marshal of the district. But this character of the writ could, in a case like the present, have been changed under these rules, by an order of the court appointing another person to make the service upon a defendant residing in the other district. The act of 1858, containing general provisions like those of the particular statutes already mentioned, gave to the plaintiff in every suit not local, against parties residing in different districts of a State, an election of the district in which to proceed; and thus rendered the practice on the subject uniform throughout the United States. The subpœna issued in duplicate under this act is, in effect, a writ directed to the respective marshals of the two districts, to be served by each upon such defendants named in it as reside in his district.

In suits in equity, the average number of original parties is very much greater than in suits at law, and the necessity for adding other parties often develops itself as the suits proceed. This act must, therefore, have been intended to apply to suits in equity, unless the remedial purposes of its provisions had already been attainable in such suits under the former practice established by the rules of the Supreme Court. If the act were inapplicable to such suits, the complainants might, therefore, with even more certainty as to the correctness of the practice, proceed in this case, under an appointment of a person other than the marshal of this district, to serve the process upon a new defendant in the western district.

Had the decision been that a subpœna issued by this court, in a suit in equity, could not, independently of the enabling provisions of this act of 4th May, 1858, have been served in the western district, the present case would be embraced within these provisions of the act. It is true that the act applies only to suits brought after it was passed. But the complainants can proceed properly, for the purpose in question, in one way only. This, as we have seen, is by an *original bill in the nature of a supplemental bill,* which would be, as to the former defendants, a *supplemental,* but, as to S. B. Ludlow, an *entirely original* bill (ante, pp. 25, 27). The reason and spirit of the act of 1858 cannot require the complainants to go through the absurd formality of obtaining an order for the dismissal, without prejudice, of their original bill, as against the former defendants, for the mere purpose of bringing the case within the literal application of the words of the act, by recommencing the proceeding against those parties. By so doing, they could certainly bring themselves within the letter of the act. But it is, to S. B. Ludlow, unimportant whether he is made an additional party under such a proceeding, or in the other mode. The proceeding would not, as to him, be less original, in the one case than in the other. So far as the proceeding is against "two or more defendants residing in different districts in the same State," the suit would, for the first time, be *brought,* when the original bill in the nature of a supplemental bill might be filed.

The case is, therefore, perhaps, within the *words,* but certainly within the *reason and meaning* of the law.

The result appears to be that, under an original bill in the nature of a supplemental bill against the former defendants and S. B. Ludlow, service of a duplicate writ of subpœna could be made upon S. B. Ludlow, in the western district, either under the act of 1858, or independently of its provisions.

The complainants, having proceeded by simple amendment and addition of a party, could not avail themselves of the provisions of this act as to the service of process. They applied, by motion, for the appointment by the court of a person to serve the subpœna, in the western district, upon S. B. Ludlow. Whether this motion should be allowed, was a question depending upon the practice prior to that act. Their proceeding, having been instituted otherwise than by original bill in the nature of a supplemental bill, was irregular. S. B. Ludlow might, after service of the subpœna, have made any objection to which the proceeding would, on this account, have been liable. But he must have appeared for the purpose of making such objection. He might have waived the objection, and have acquiesced in, or disclaimed opposition to, the prayer of the bill. The objection was one, therefore, which the original defendants could not urge. Whether the court would sanction service of the process of subpœna out of the district, though within the State, by making such an order as was asked, was, however, an independent question. Upon this question, as the court is now advised, the motion should have been allowed. Its allowance might, indeed, have been productive of additional delay, or of results even more unfavorable to the complainants. But this concerned them, and not the court. When the motion was heard, however, the court had not so fully considered the subject as to be prepared to act advisedly upon it, and the return-day of a subpœna which had been isued, passed before the order could be made. Certain occurrences which afterwards took place do not, at present, require consideration. The subject

will probably be brought again before the court in such a mode as may present the case in a different aspect.

It is a case of which the principal difficulties have arisen from incidents of the litigation. The agreement made before the master by the parties, without the sanction of the court, dispensing with his report of the general account and disposition of the remittances, and with his report upon the specific points on which it had been ordered, was an act which would not have prevented the court, if the master had been living, from sending the case back to him for the report which had been ordered. As he was dead when the case was afterwards heard, it would probably have been referred to another master for such a report, if the parties to the agreement before the late master had been alone interested in the proceedings. But other persons, on whose behalf also the suit is prosecuted, are interested, and the delays in its progress have been great. The court, therefore, assumed upon itself the performance of the duties which had been delegated to the late master. A report of the facts of the case, resembling somewhat a master's report, was consequently made, and the particulars of the account which the master should have stated, were, to some extent, set forth incidentally by the court in the opinion prepared as above, but not as yet read or filed. The foregoing statement of the facts is a syllabus of those detailed in this former opinion.

Some of the questions involved have, during the pendency of the suit, been litigated in courts of the State, in proceedings against other parties, upon evidence partially deficient on some, and wholly deficient on other material points of the controversy, which has here been considered. The form of the proceedings in the State Courts was, moreover, not adapted to the proper adjudication of such questions. Thus, in a case in which considerations of commercial convenience, and those of social morality, were to be doctrinally reconciled, the proceedings were embarrassed with technical difficulties even more than those in this court have been thus embarrassed. As a consequence of the two-fold litigation, the points of argument have

been inconveniently multiplied. The importance of some of the questions, and the novelty of some of the aspects in which they were presented, caused an unusually extended reference to authorities in the former opinion which has been mentioned.

For this, and the above, reasons, its length was very great. In order to avoid increasing unnecessarily that of the record, it was not filed while the probable course of proceedings in the cause appeared uncertain. It is now subjoined and filed. To facilitate the application of the foregoing abstract of the propositions considered in it, occasional notes of reference to them have been inserted. Some references to reported cases which have been since published have also been added.

OPINION PREPARED AFTER THE HEARING IN 1858.

The substance of this opinion was orally stated in Court on 23d July, 1858. A note of it, as then delivered, was taken by a gentleman of the bar. From this note, and from previously made memoranda, it was afterwards written out, with some additions, but no alterations. It was not formally read or filed, because the case was standing over upon the objection of want of parties, and the ultimate result of this objection appeared to be uncertain, as is explained in the foregoing opinion.

CADWALADER, J.

The complainants, Winter, Latimer & Co., and Johns Hopkins, filed their original bill on 8th October, 1851, against Robert M. Ludlow and R. McKinney Ludlow, transacting business at Philadelphia under the name of Ludlow & Co. These defendants had failed in business on 25th August, 1851. It was known that the arrival in California of the news of their failure must have caused that of Samuel Beebee Ludlow, who transacted business at San Francisco under the name of S. Beebee Ludlow & Co. He had been in the habit of drawing upon the defendants, negotiating the drafts at San Francisco, investing the proceeds in bullion or bills of other drawers upon other persons on the Atlantic side of the continent, and remitting these investments to the defendants at Philadelphia. The suit was founded upon the allegation that there had been an

express or implied appropriation, special or general, of these remittances in bullion and bills for the security of his drafts upon the defendants. The purpose of the suit was the ascertainment of the interests and enforcement of the rights of the holders of these drafts in the remittances received and expected, and, in aid of this purpose, discovery, an account, injunction, and the appointment of a receiver. The complainants, Winter, Latimer & Co., were payees and endorsers of certain of the drafts which the defendants had accepted. The complainant Hopkins held some of these acceptances thus endorsed by Winter, Latimer & Co., payees, and also some other acceptances of S. Beebee Ludlow's drafts upon the defendants in favor of and endorsed by other parties. The complainants, in the original, and in an amended bill, declare that they sue on behalf of themselves and of all other holders of such of his drafts as were, or ought to have been, accepted by the defendants.

The word *appropriation* has no peculiar definite legal applicability. It may be used in the sense of an *agreement,* express or implied, on the part of a remitter, or consignor, that a qualified or absolute property in a remittance or consignment shall vest in another person at the commencement of its transit, or from some earlier or later period before or after its actual delivery. The doctrine of *appropriation,* when the word is thus understood, is dependent, first, upon an *ascertainment of the subject,* and secondly, upon the *agreement* that the property shall *vest.* The agreement that it shall vest may be *implied* from the relations of the parties to each other, and from the circumstances of the transaction. But an *agreement,* express or implied, is essential. Property, indeed, never changes its ownership among living persons otherwise than through judicial divestiture, unless under an agreement of some kind. The general, though perhaps not universal, tendency of the rules of the Roman law, as to movable property, was, that its ownership could not be changed, effectually, by agreement alone, without a transmutation of the possession. The impression of these rules has influenced the doctrinal tendencies of the modern

jurisprudence of Continental Europe, though exceptions from their operation are allowed in certain cases, including some in which the effect of a constructive or symbolical transfer of possession is attributed to certain commercial proprietary documents. The general rule of English law adopted in this country is, that "property may pass by an *agreement" alone,* when it is founded upon a sufficient consideration. The decisions in England and in this country, therefore, sustain conventional changes, absolute or qualified, of the ownership of property in its transit from one place to another, and assignments, by way of security or otherwise, of effects or funds in the possession of persons not parties to the tranaction. These decisions rest upon principles of general and uniform applicability rather than, as on the continent of Europe, upon peculiar or exceptional reasons. See 2 Welsb. Hurlst. & G. 6; 6 Robinson, 321; 4 Mees. & Welsb. 791; 9 Mees. & Welsb. 419-422; 12 Mees. & Welsb. 17, 18; 1 Bos. & Pul. 563; 8 Ad. & El., N. S. 1; 1 Peters, 445-449; 8 Howard, 384; 4 Wash. C. C. 422, 423; 3 Hurlst. & N. 497.

Under the principles upon which these, and other decisions, depend, a qualified or absolute property in a commercial remittance or consignment may vest in the intended receiver at the time of the commencement of the transit, or even sooner. Whether he is an absolute purchaser, a creditor, a bailee, an agent, or a trustee for third persons, if the purpose of the contract under which he is to receive it apparently requires that an absolute or qualified property shall vest in him, any act by which the remitter or consignor determines its destination to him, is, in the absence of proof of a different intention, interpretable as an *appropriation* of it for the purpose thus required. Such an appropriation, whether thus implied or made in express terms, is, if upon a sufficient consideration, irrevocable. The interest, qualified or absolute, of the intended receiver, vests in him from its date, and continues in him afterwards, during the transit, and also subsequently.

This doctrine is in general applied at law as it is in equity.

But its application is in some respects more extended in courts of equity than in courts of law. Under one head the jurisdiction of courts of equity in such cases of appropriation is exclusive. This is where the owner of an existing or expected fund in the hands of another person appropriates less than the whole of it, or appropriates the whole in fractional parts, in such a manner as to divide an otherwise entire and sole accountability of a holder of the fund. Such a holder, if he has not acquiesced in the appropriation, cannot be sued at law by the several parties respectively interested under it in the fund. The only action maintainable against him at law is an entire one at the suit of the party who made the transfer or appropriation. (See 5 Wheat. 286, cited in 5 Peters, 598.) The decisions on the subject at law* were examined, and the rule enforced in the cases reported in 5 Peters, 580, 584, 602; 16 Barbour, 501, and 2 Casey, 90. But the holder of a fund thus appropriated may be proceeded against in a court of equity where the rights of every one of the several parties interested under the appropriation may be taken care of in a single proceeding. (See 3 Swanston, 393; 4 Mylne & Craig, 702, 703, and 5 Peters, 602.) On this point, a case, after concurring adjudications *at law* in the King's Bench and Exchequer Chamber, has been differently decided *in equity* by the Commissioners of the Great Seal in England, affirming a decree of the Vice Chancellor. (7 Sim. 109.)

An appropriation of the remittances in question might have been so made by S. B. Ludlow as to constitute a direct equitable security for his *drafts* upon the defendants. This appropriation would then have enured to the benefit of the payees and endorsees, including even holders who, when they received the drafts, were ignorant that any such appropriation had been made. Exp. Gladstones, 3 Mont. & De G. 109, cited in the

* The leading English decision is Williams *v.* Everett, 14 East, 582; and see Grant *v.* Austen, 3 Price, 58; Yates *v.* Bell, 3 Barn. & Ald. 643, and Moore *v.* Bushell, 27 L. J. Exch. p. 3. The decisions on the subject in Pennsylvania will be particularly mentioned in a subsequent part of this opinion.

argument, shows that a bill of exchange may be so drawn as to include such an appropriation, and that if one of S. B. Ludlow's drafts upon the defendants had contained a direction to place the sum drawn for to the account of his remittances, or of any one remittance in particular, this would have constituted an effectual appropriation of the proceeds for the payment of such bill. An appropriation in this precise form or mode is unfrequent. But appropriations, express or symbolical, of remittances or consignments, for the security of the holders of bills of exchange may be made in various other modes, all equally effectual, except in the degrees of protection which they may afford against fraud. (See 4 Wash. C. C. 418, 662; 1 Peters, 445; 4 Peters, 291.) The party to whom the bill of exchange to be secured is negotiated frequently requires a transfer to him, or deposit with him, of the bill of lading, or carrier's receipt, for the property to be appropriated. When the shipment has been made by a bill of lading for goods deliverable to the remitter himself or his order, the possession of the bill of lading, endorsed in blank, or endorsed specially to the order of the party to be secured, or of his designated agent, may constitute a sufficient appropriation. When the bill of lading is to the order of the consignee of a shipment which is owned by the consignor, an effectual pledge or appropriation is not always obtainable so simply. But it is nevertheless often obtainable satisfactorily. The party who takes a bill of lading of this form inquires as to the relation of the consignee to the remitter. If this relation be that of an agent of the remitter, an assignment by the remitter, on the back of the bill of lading or otherwise, answers equitably, if not legally, the purpose intended. But the remitter usually delivers with it a letter of instructions to the consignee appropriating the proceeds of the shipment specifically to this purpose. When the business has been transacted wholly by the remitter, who has dispatched such a letter of instructions with a shipment which is already abroad or in the course of transportation, the bill holder may afterwards wish to obtain proof to accompany the bill, showing that it has thus been secured. He may obtain such proof in the form of

a copy or extract from the remitter's letter book certified by him to contain the instructions as to the disposition of the consignment which have been transmitted to the consignee as his agent. Such an extract or copy is often annexed to the triplicate of the bill of lading which had remained with the consignor, and, with a policy of insurance, accompanies the draft in its circulation. In these and in other modes in which the practice might be further exemplified, appropriations of property to the value of countless millions are of constant recurrence. They secure, in the remotest parts of the world, the remittances, or their proceeds, or the investments and reinvestments of such proceeds in various forms, to the respective bill holders, the substitute for the original remittance, wherever it can be traced and identified, retaining the impression of the special ownership created by the appropriation until its purposes have been fulfilled. (1 Peters, 447, 448.)

In cases of this description, when the draft secured is upon an agent of the drawer to whom he makes the remittance, the agent becomes a trustee for the draft holder. In the case of a single draft, and a remittance appropriated for its particular security, the trust must be executed for the benefit of the draft holder, without reference to the state of accounts between the remitter and his agent on whom it is drawn. (3 Campb. 92; 4 Comstock, 501.) The agent who is drawee, when he accepts the draft, "becomes," in the language of this court, "the principal debtor to the holder," but, nevertheless, "the *surety* of the drawer entitled to full indemnity. (Baldw. 538.) Lord Cranworth has also recognized the relation of such an acceptor, as that of a *surety*, who, when he pays the draft, is entitled "to *indemnify himself*" out of the remittance "as far as it will extend." (3 DeG., Macn. & G. 450, 451.) When there is a series of drafts, and a succession of remittances appropriated for their security, and the agent pays, from other sources, the drafts first falling due, he is, to their amounts, as a surety,* substituted for the draft holders whom he has paid. He may, there-

* See ante, p. 12, 1st proposition.

fore, without committing a breach of trust, reimburse himself* out of the proceeds or avails of the remittances, though, in so doing, he should exhaust the fund, and though he should himself continue to be liable, as acceptor, for an unsecured amount. But, so long as there is, in his hands, a surplus, in amount or value, beyond the amount of the advances which he may thus reimburse, he is, as has been stated, a *trustee* for the draft holders.

The case hitherto considered is that in which there has been a direct appropriation, express, or symbolical, for the security of the *drafts*. This case must be distinguished from the case of remittances to an agent on whom the drafts are drawn where the remittances are appropriated in order to secure *him* as the *intended acceptor,* without any such direct appropriation for the security of the drafts. The qualified *interest* of such an agent in the remittances, under an *appropriation* of them for his own indemnity, must also be distinguished from his *lien* for a like purpose, which, if there were no such appropriation, would attach to them when in his possession.† The word *lien* is here used in the sense of a right which, without being attended with any proprietary interest, enables the possessor of another's property to retain, under certain circumstances, the possession of it for purposes of self security.

Bankers, or factors, or parties whose agency is compounded, in any degree, of both characters, have a *general lien* upon their principal's remittances, and upon all securities and investments which are their product, or substitute. This lien, after it has attached, and so long as it subsists, enables the agents to apply his funds in their hands to the discharge of their advances on his account, and hold or apply the surplus for their own indemnification against their accrued and accruing liabilities for his account. Agents can have no such lien without *actual* possession. A *prospective* lien affords them no security. This was decided in England, by the House of Lords, in Kinlock *v.*

* See ante, p. 12, 3d proposition.

† See p. 12, 4th and 5th propositions.

Craig, 3 Durnf. & E. 787. A confusion of the distinct subjects of *lien* and *appropriation* has occasioned a mistake, sometimes made, in saying that agents may, in certain cases, acquire a *constructive possession* of a remittance, or consignment, on its way to them, so that their lien may attach *prospectively* during the transit, or from its commencement. This confusion is avoided by observing that a *lien* in favor of parties in this relation to a remitter cannot attach until they, or their own agents, have obtained an *actual* possession, but that a *qualified interest* which, though *not a lien,* is more than equivalent as a *security,* may, under an *appropriation* express, or implied, vest in them *before* they acquire possession.

In the leading case of Haile *v.* Smith, in the Exchequer Chamber, 1 Bos. & Pul. 563, bills of lading for merchandise to a shipper's own order, endorsed by him in blank, had been sent by him, with an invoice, to his factors, who were also his bankers. They were, by agreement, to have received the consignment as a collateral security for their acceptances, and intended acceptances, of a series of his drafts upon them. The decision was that the consignment, though made to them for sale, as his agents, and under his direction, was made also to enable them to indemnify themselves out of the proceeds, against their advances and acceptances, and, therefore, that the moment the goods were placed on shipboard, and the bill of lading was endorsed and remitted to them, though the vessel, having been detained by an embargo, had not sailed, the property required for the purpose of effectuating the intended security was vested in them. The rule of decision is the same whether the transportation is by land, or by water, and whether the right of the intended receiver of the property to take possession at the end of the transit is attested by a bill of lading, a carrier's, wharfinger's, or wharehouseman's receipt, or any other proprietary document. It may be sufficiently attested by an informal paper without a commercial name, or by "correspondence alone." (Gibson *v.* Stevens, 8 Howard, 399; Holl *v.* Griffith, 10 Bingh. 246; Bryans *v.* Nix, 4 Mees. & Welsb. 775, 791; Grosvenor *v.* Phillips, 2 Hill, 147; Holbrook *v.* Wright, 24 Wendell, 173;

Dows *v.* Green, 16 Barbour, 72; Nesmith *v.* Dyeing Co., 1 Curtis, 130.) The mere act of transmission, accompanied with adequate evidence of an intention to pass the qualified interest required for the purpose of securing the intended receiver, suffices to prove the agreement that such an interest shall vest in him for the purpose. This intention has been inferred from the relations alone of the parties where the act of transmission has been an apparent fulfilment of an express or implied obligation to provide such a security for the intended receiver. In the above-cited case of Bainbridge *v.* Wilcox, Baldw. 538, where agents on whom bills of exchange were drawn were "bankers and commission merchants" in a foreign country whose relation to the drawer was defined as "that of agent, factor, and depositary," this court said, it is *"the duty of a person who draws bills on another without funds, to place them in the hands of the acceptor before the bill is due."* (See also 1 Peters, 290; 2 Mylne & Cr. 405.) Between parties in this relation to each other, the mere act of remittance perhaps implies an appropriation for the security of the agent. But, in the present case, the decision of this precise point will not be required.

According to the decisions reported in 1 Bos. & Pul. 563, 1 Pet. 441, 8 How. 400, and 1 Curtis, 130, the absolute or qualified interest, under an appropriation of a remittance in transit, which vests in the intended receiver—whether he is a purchaser from the remitter under an absolute sale,—or is a trustee for other persons who are secured by the remittance,—or is a creditor of the remitter directly secured, but not his agent, or otherwise than for purposes of self security, his bailee,—or is an agent, such as a banker, or a factor, who, though secured in respect of his advances and liabilities, is a bailee for purposes in which the remitter is interested,—is, in its character, a *legal* title. In the last-mentioned case, that of an agent of the remitter, the qualified *legal interest* of the agent, when in possession, partakes to some extent of the character of the *lien* which, if there had not been any such appropriation, would have been incidental to the agency. But it is, in the language of Judge

Curtis, something more than a "lien." The qualified interest of the agent under it vests in him, as we have seen, before his lien could attach. It may, as we will hereafter see, continue to subsist after his lien would expire. Whether he is in possession under it or not, it enables him to maintain an action in his own name for any wrongful detention or other injury to the subject of the special property. His legal title is, however, only the qualified legal interest required in order to effectuate the purpose of the appropriation. This purpose is, in such a case, that of security only. His title is, in one or more of the reported cases, compared to that of a mortgagee. It is a special trust vested in him to secure his liabilities for, and advances to, the remitter, whose resulting beneficial ownership still subsists for all ulterior purposes. When the agent is an acceptor, or intended acceptor of drafts of the remitter, the comparison of the appropriation for his indemnity to a mortgage must include, in the specific definition of the security, a description of the mortgagee as a *surety* of the mortgagor.

Two cases of remittances to agents of the remitter have thus been described as distinguishable from each other. The first case is that in which the remittances are appropriated for the security of his drafts upon the agents. The second case is that of a mere appropriation of the remittances to secure the agents themselves, as intended acceptors of the drafts. The former case, in effect, includes the latter; that is to say, an appropriation by the remitter to secure the drafts is, in effect, a security which indemnifies the agents as acceptors. But the converse proposition, that the second case includes the first, or, in other words, that a mere appropriation to secure such intended acceptors constitutes or includes a security for the drafts, or implies an intention to create such a security, does not follow as a *consequence*. The next inquiry will be, whether such a proposition can be maintained on independent grounds.

The prevalence of the commercial usage of making, in the modes in which it has been exemplified, express or symbolical appropriations for the direct security of bills of exchange drawn against remittances or consignments, where it is intended that

the bill holders are to be secured in their own right, indicates, by contrast, the effect of the omission of the remitter or consignor to perform any act indicative of such an intention. The question, what will constitute a *sufficient* appropriation for the security of a bill holder, has often been judicially discussed. Its discussion has usually been based upon a concession that some act of the remitter indicating such an intention is indispensable to the bill holder's acquisition of a cognizable independent interest, legal or equitable, of his own. Such a concession has, for example, been implied in cases in which it has been assumed that the dishonor of a draft of a remitter upon his agent may so affect the consideration of a security intended for the agent's indemnity as to render an appropriation for the purpose revocable by the remitter. (4 Mees. & Welsb. 792; 4 Scott, N. R. 52, 53; 3 Mann. & Gr. 619, 620.) If the holder of the dishonored draft had an interest in the intended security, it could not be thus revocable without his concurrence.

The circumstance that a remitter has *intended* that his draft shall be paid out of the proceeds of a remittance made, or to be made, or that a draft is, in commercial parlance, *drawn against* the remittance, or that the remittance has been made in order to *meet* a draft or intended draft, has not, therefore, been in general understood as imparting to the draft holder an interest of his own in the remittance. If such an understanding is not implied as to a single draft and remittance, it cannot be implied in the case of a series of drafts and remittances where no draft has been drawn against any particular remittance, but the remitter has intended his drafts to be paid indiscriminately out of the general proceeds of his remittances, as far as their amounts might suffice. The circumstance that there is, in such a case, an express or implied appropriation by the remitter for the security of the party on whom his drafts are drawn, does not in itself alone create a privity between either this party, or the remitter, and the drawees or endorsees. Independently of the relation of principal and surety between the remitter and the drawee as intended acceptor, the application of this doctrine would be not less simple in equity than at law. In 2 Keen, 98,

Lord Langsdale said: "When two persons, for a valuable consideration between themselves, covenant to do some act for the benefit of a mere stranger, that stranger has not a right to enforce the covenant against the two, though each one might against the other." The general truth of this remark was recognized in 2 Younge & Collier Ch. Rep. 462. There is no trust for such a stranger unless one is expressly declared for his benefit, or arises by necessary implication from some act of the original parties equivalent in its effect to the declaration of such a trust.

But when there is an express or implied appropriation for the security of the agent, who is drawee, he stands, as we have seen, on the footing of a *surety* for the remitter. A question has therefore arisen whether the draft holders are not entitled, in equity, to the benefit of such an appropriation. When there is a principal debtor and a surety, the surety's indemnification may sometimes be worked out by giving to the creditor the benefit of securities which the principal has given originally to the surety. This was, probably, the meaning of Sir William Grant, in the first clause of the following passage, in his judgment in Wright *v.* Morley, 11 Vesey, 22: "As *the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety,* the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor." The proposition stated in the latter clause of the passage, that *a surety is entitled to the benefit of all securities received by the creditor from the principal,* is an incontestable rule of equity which was applied by Sir W. Grant, in his judgment in that case. But this rule has been established, and subsists, without any dependence upon the proposition that "the *creditor* is entitled to the benefit of all the securities the *principal debtor* has given to his surety," which Sir W. Grant is reported to have stated in the prior clause. That the whole passage might have been omitted, without altering his judgment or the course of his reasoning, was afterwards clearly shown in an argument of counsel, reported in 2 Glyn & Jameson, 411, 412. The only authority in the books giving any ap-

parent support to the proposition said to have been stated by Sir William Grant in the prior clause of the passage, was a case in 1 Eq. Abr. 93, pl. 5, of which the whole report is in these words: "A bond creditor shall, in this court, have the benefit of all counter bonds or collateral security given by the principal to the surety; as, if A. owes B. money, and he and C. are bound for it, and A. gives C. a mortgage or bond to indemnify him, B. shall have the benefit of it to recover his debt. (Mich. 1692, Maure & Harrison.) Probably some fact was omitted which, if stated in the report, would have shown that the recourse of the creditor to the mortgage was required in order to work out an equity of the surety. Of the case, as reported, Lord Eldon said, in 1815, that he had never heard it relied on as a governing case at this day. (2 Gl. & Jam. 411; 2 Rose, 184, a.) It is in principle, opposed to the decision of Finney *v.* Finney, 4 Harris, 380, and repugnant to many authorities in which subrogation or contribution, unless *in favor* of a surety, has been held to be contrary to equity. (1 Ves. Sr. 252; 3 Co. 12, b; 2 Watts, 206, 207; 10 Serg. & Raw. 450; 1 Barr. 273-280; 2 Barr. 217, 218; 5 Watts, 231; 3 Watts, 477; 5 Watts, 208; 5 Raw. 51; 1 Raw. 302; 3 Watts & Serg. 404; 4 Johns. Ch. 546; 5 Johns. Ch. 235; I Paige, 228; 2 Paige, 182; 8 Paige, 277.)

The case in which Lord Eldon made this remark (Exp. Waring) arose from two bankruptcies, that of a London banking house, and that of manufacturers in Lancashire, who had been their customers. Their business had been transacted under an agreement that the manufacturers should deposit such negotiable paper as they should receive in the course of their dealings, with the bankers, and should be at liberty to draw upon them from time, as their occasions might require, leaving always a surplus on hand, and paying a commission on acceptances. The manufacturers had also deposited with the bankers other collateral security for any advances made or to be made. This arrangement clearly constituted an appropriation for the security of the bankers. Holders of their acceptances of the customer's drafts petitioned in bankruptcy that the securities

thus appropriated should be applied in payment of these acceptances. The prayer of the petition was granted, in order that equities between the two bankrupt estates, which could not otherwise be reached, might be worked out, under a principle which will hereafter be stated and explained. But this, as will be seen in the proper place, could have been done only under a forced or otherwise irrevocable administration of the funds, on the footing of established insolvency. Lord Eldon said: "Supposing a commission not to have issued, I do not see anything in this transaction between persons thus dealing with their bankers, and making a deposit of this sort, which would entitle the creditors to say that they have an equity attaching on these effects; that is to say, that the moment a pledge is put into the hands of the banker, he becomes a surety for them to whom his acceptances are delivered." He was of opinion that the petition could not have been supported on this ground. (2 Gl. & Jam. 415.)

A subsequent observation upon this case, by Sir George Rose, one of the judges of the English court of bankruptcy, might suggest an inquiry whether the draft holders were not equitably substituted for the *drawer,* as *assigns* of such an interest in his remittances as might enable them to compel the same application of the proceeds to the payment of the drafts, that he could have compelled. (4 Deac. & Ch. 602.) This inquiry cannot, however, be prosecuted without a primary resolution of the question whether the appropriation of the remittances was for the security of the drafts, or for the mere indemnification of the drawees, as intended acceptors and sureties. Drafts, not, on their face, orders on any particular fund, but, in form, proper bills of exchange, though as between the drawer and the drawees a particular fund in the hands of the drawees has been appropriated for their payment, neither constitute an equitable assignment of this fund, nor create a trust which attaches to it for the benefit of the draft holders.

The Court of Appeals of New York, in Cowperthwait *v.* Sheffield, 3 Comstock, 251, recognizing this doctrine, said: "A proper bill of exchange does not, of itself, operate as an assign-

ment to the payee of the funds of the drawer, in the hands of the drawee; and, even after an unconditional acceptance, it cannot, in strictness, be held to have that effect, since the drawee becomes bound, by reason of the contract of acceptance, irrespective of the funds in his hands. He may refuse, when he ought to accept, by reason of having funds; and yet, neither he nor the funds would in any way be bound or affected by the bill." The remark of Lord Eldon, in 6 Ves. 450, that "you cannot attach equities upon bills of exchange," was here, in effect, applied *against*, though he had applied it in *favor* of the holders.

Thus, even if the sole relation betwen the remitter and the drawees had been that of principal and *sureties*, the draft holders could not entitle themselves to the benefit of the security by merely showing that it was appropriated for the drawees' indemnification. But, in cases like the present, the sole relation is not that of principal and *sureties*. The superadded relation of principal and *agents* introduces particular considerations, which, if the case were otherwise doubtful, could not, on this point, be disregarded.* This relation could not usefully subsist for commercial purposes, if the principal's remittances were subject, in the hands of his agents, to the control or intermeddling of such unknown parties as might, from time to time, happen to become holders of the drafts. If the funds in question had been the proceeds of effects not remitted by the drawer to the drawees as his agents, but transmitted by him, without their privity or that of the holders, to other persons as his agents, with a direction to pay the proceeds in discharge of the drafts, he could have countermanded this direction at any time before its execution, or, at all events, before it had been properly communicated to parties interested in its execution. (Scott *v.* Porcher, 3 Meriv. 652, 664.) The only difference resulting from the circumstance that the remittances were to the drawees as the agents, with an appropriation for their security, was that *he and they* could, by a *concurrent* act, revoke the appropriation to which the draft holders were not privy.

* See ante, p. 15, 9th proposition.

A rule of equity jurisdiction which would enable the draft holders to require the remittances to be held, or applied for their security, when there has not been a direct appropriation for the purpose, would impede seriously the transaction of commercial business. The consequence of such a rule, as Lord Eldon suggested in Exp. Waring, 2 Gl. & Jam. 415; 2 Rose, 185; 19 Ves. 349, would be that the remitter and his agent could not, in their own relations of business, make any new arrangements without the consent of the draft holders, "a proposition" which Lord Cranworth afterwards pronounced "utterly untenable." (3 De G., Macn. & G. 448.)

When there has been a direct appropriation for the security of the drafts, its interference with such arrangements is the result of a*greement*, and, *therefore*, is not a subject of any reasonable complaint. But when there has not been any such agreement, though there may have been an appropriation for the security of the agent, commercial convenience requires that the business of the agency may be transacted without any such interference of third persons.

In Cowperthwait *v.* Sheffield, already cited (3 Comstock, 243, 250-253, affirming 1 Sandf. 416, 449-451), this point was decided by the Court of Appeals of the State of New York. A shipment of cotton having been made from Mobile to Glasgow, the consignor drew bills of exchange upon the consignee, and wrote informing him that they had been drawn on account of the shipment. The consignor deposed that the remittance was *intended* to meet the demands of the holders of the bills. But neither this letter of advice nor the bill of lading accompanied them when they were put into the market; and there was no evidence that the bills were negotiated on the faith of an appropriation of the shipment, or of its proceeds, to their payment. The court saying that the remitter "no doubt *expected* that, by reason of this advice," the consignee "would have been induced to honor the bills, upon the prospect thus held out of receiving funds for" his "indemnity," decided, nevertheless, that the remittance was not appropriate for the security of the holders of the bills; adding the remark that, if the letter of

advice "could, by any equitable intendment, be held to amount to a specific direction to apply the proceeds of the shipment to the payment of these bills, it could only be in favor of a party who had notice of the arrangement, and who had purchased the bills, or become liable upon them, on the faith of it." The correctness of this decision has been recognized by the Supreme Court of Pennsylvania. (2 Casey, 89.)

In the present case, therefore, if the relations between S. B. Ludlow and the defendants were such as they could, by *mutual consent,* without the concurrence of the draft holders, have revoked or modified, the draft holders had no cognizable interest of their own in the remittances; and the circumstance that, between S. B. Ludlow and the defendants, the remittances were appropriated for the security of the defendants, would not suffice to confer an equitable interest upon the draft holders.*

But, if the remittances were thus appropriated for the security of the defendants, S. B. Ludlow had no right to take any part of them away from the defendants against their will, without first repaying their advances, and exonerating them from all their outstanding liabilities to the draft holders; nor could the defendants, without his consent, apply the proceeds of his remittances remaining after the reimbursement of their advances to any purpose other than the payment of the drafts. (See 2 Deacon, 309, 310; 12 Ves. 121, 122.) The relations between him and the defendants would thus not have been revocable by either party, without the consent of the other;† and, unless rescinded, or modified by mutual consent, would have enured incidentally to the benefit of all, or some of the draft holders, though not in any right of their own. (See 2 Younge & Coll. Ch. Rep., 460, 461.)

If the original appropriation of the remittances had, under such circumstances, been for the security, not of the drafts, but of the defendants as intended acceptors, either they alone, or S. B. Ludlow alone, could have *afterwards* created an effectual security for the draft holders by making in their favor an ap-

* See ante, p. 15, 9th proposition.

† See ante, pp. 15, 16, 10th proposition.

propriation of such surplus of the proceeds of the remittances as might remain in the hands of the defendants after the reimbursement of their charges and advances.

Such a subsequent appropriation by S. B. Ludlow would, of course, have the same effect as an original appropriation by him for the purpose. (See Hassall *v.* Smithers, 12 Ves. 119, 122; Burn *v.* Carvalho, 7 Simons, 109.*)

The subsequent appropriation, if made *by the defendants,* would so attach to the proceeds that the defendants would no longer be capable of making, in concurrence with S. B. Ludlow, any different disposition of the fund. He therefore could not prevent their appropriation of it from taking effect unless he paid the drafts from other sources. A suit in equity by the draft holders to compel the application of the *specific* proceeds conformably to such an application by the defendants could not be maintained against them without making S. B. Ludlow also a party. A decree against him would not indeed be necessary. But according to the rules of procedure in equity, an opportunity should be afforded him of contesting the allegations of the complainants in such a suit, and of redeeming his remittances by payment of the drafts, or disclaiming a purpose to pay them from other sources.†

In the absence of appropriation either by S. B. Ludlow or by the defendants for the security of the drafts, if the remittances were, as between him and the defendants, appropriated for the security of the defendants as drawers, a relative impossibility that the draft holders could be deprived of the benefit indirectly incidental to such an appropriation might result from subsequent occurrences. It might thus result from the insolvency of S. B. Ludlow and the defendants, and either the death of one or both of them, or such a judicial or conventional divestiture in their lifetime of the interest of one or both of them as would occasion an administration of the fund on the footing of recognized insolvency. The orginal appropriation would become one of *indefinite continuance* whenever S. B. Ludlow

* See ante, p. 17, 13th proposition.

† This point is fully considered, ante pp. 19-23.

and the defendants might from any cause become thus *incapable of concurring* in any *different* arrangement for the disposition of the remittances or of their proceeds. The draft holders could not then be deprived of the benefit incidental to this appropriation; and it would therefore become cognizable in a court of equity as an indirect security which might be rendered available for their benefit. The jurisdiction of such a court would be exercised as a means of administering in the case, equities, not of the draft holders themselves, but of the original parties to the appropriation, whose rights under it, or those of parties interested in their estates, could not be otherwise enforced without inconvenient circuity of remedy. Their equities in the language of English Chancellors could not be otherwise reached and *worked out*. For special reasons, thus rendering the case an exception from the general rule to the contrary, the draft holders, notwithstanding their want of direct privity of interest, can assert, in such a case, as creditors of a principal debtor and sureties, a derivative right under an appropriation intended originally for the benefit of the sureties. This derivative right of the draft holders, though previously so contingent or dependent as not to be cognizable, may thus, under such circumstances, become available for their security.*

This equitable jurisdiction somewhat resembles that exercised under compulsory or other irrevocable administration of estates of deceased or living insolvent *partners*. Their joint debts must be paid in full out of their joint effects, before any part of these effects can be made applicable to the payment of a separate debt of one of the partners. If he is indebted to a copartner in an amount of which payment is required in order to equalize their accounts with the firm, this amount must also be paid out of the joint effects before any part of them can be applied compulsorily in payment of any separate debt. If these two rules were not observed, the interest of one partner in the joint concern might be taken from him and applied in payment

* See ante, p. 15, 10th proposition.

of the other partner's debt. The copartner entitled to receive an amount for the equalization of accounts between the members of the firm has indeed a lien for this amount upon the joint effects. But *other persons who are creditors* of the firm have no such independent equity as gives to *them*, in their own right, a lien for their debts upon the joint effects. These joint creditors are nevertheless entitled, when these effects are administered on the footing of a recognized insolvency, to a priority of payment out of them, because equities existing between the partners, which could not be otherwise reached, may be thus worked out. The foundation of the exercise of the jurisdiction is insolvency of the partners or of one of them, and the divestiture judicial, conventional, or by death of his or their interest in the joint effects.

Draft holders who, under the analogous jurisdiction above defined, proceed in a court of equity to obtain the benefit of an appropriation to which they were not originally privy, made by the drawer to indemnify the drawees as intended acceptors of the drafts, must make apparent the necessity for the court's interposition. The foundation of this necessity is the two-fold insolvency of the remitter who was drawer, and of the agent who, as acceptor, or intended acceptor, was to have been indemnified as a surety. "If either party, the principal or the surety, is solvent," in the language of Lord Cranworth, "no question can arise between the bill holders and those who are liable upon the bills, the bill holder gets paid in full, either by the principal or the surety. If he gets paid in full by the principal, of course he does not apply to the surety. The principal then applies to the depositee, the surety who holds the securities, and says, 'I have paid off all this against which the deposit was made with you by way of indemnity. I have, therefore, put myself in a condition to demand the securities back again.' So also, if the principal is insolvent, and the depositee is solvent, the question does not arise because the bill holder then comes on the depositee. It is no answer for him to say he was only surety. If he is solvent he pays in full, but then he clearly has a right to indemnify himself by means

of the deposit as far as it will extend." (3 De G., Macn. & G. 450, 451.) This is the rule applied in courts of equity to every *creditor's bill* where the complainant can sue at law upon his original demand. He must in every such bill aver the legal debtor's insolvency; and in some cases, though not in a case like the present, must also show that such debtor has been proceeded against at law, or could not be so proceeded against.

The draft holders, having no direct privity of interest, must, in order to sustain the proceeding, show also the *irrevocability* of the appropriation which renders it indirectly available for their security. This irrevocability must not be confounded with such irrevocability by one of two original parties as is inherent in every security. For the purpose in question, the requisite *irrevocability* is that which results from some *relative impossibility, that the original parties to the appropriation can concur in any different disposition* of the proceeds of the remittances. Until Powles *v.* Hargreaves was decided in June, 1853, by Vice Chancellor Stuart, whose decree was afterwards affirmed by the Court of Appeals, (3 De G., Macn. & G. 430,) the decisions upon the subject had all occurred under proceedings in bankruptcy. The first of them, Exp. Waring, was decided by Lord Eldon in 1815. The relations of the parties in that case, and the effect of Lord Eldon's order, have already been stated. (Ante, pp. 64, 65.) This order has recently been published in a note to 3 De G., Macn. & G. 445, 446. The argument in support of the petition for it is reported in 19 Vesey, 346-348. The opposing argument, reported by Mr. Montagu, is in 2 Gl. & Jam. 406-414. The best reports of Lord Eldon's opinion are those in 2 Rose, 184, and 19 Ves. 348, though some passages in the note of it in 2 Gl. & Jam. 415, 416, also merit attention. The cases on the subject which occurred between the years 1815 and 1853, were Exp. Parr, Buck, 196; Exp. Perfect, 1 Mont. 25; Exp. Hobhouse, 2 Deacon, 291, 3 Mont. & A. 269; Exp. Copeland, 3 Deac. & Ch. 199, 2 Mont. & A. 177; Exp. Prescott, 1 Mont. & A. 316, 3 Deac. & Ch. 218, 4 Deac. & Ch. 24.

If the present case had occurred in England, and the defend-

ants and S. B. Ludlow had been declared bankrupt, the respective assignees of their estates would have had no right or power to annul any appropriation of his remittances for the defendants' indemnity that might, *as between him and them,* have been in force at the time of the bankruptcy. The draft holders could not have been deprived of the incidental benefit of this appropriation, as an indirect security for the payment of the drafts. They might, therefore, upon petition, according to these authorities, have obtained an order in bankruptcy for such application of the funds, in discharge of the drafts, as the defendants would, between S. B. Ludlow and themselves, have been *entitled,* not less than *bound,* to make, if no bankruptcy had occurred, and the original appropriation had continued in force.

Until a recent period, it was doubted in England whether this jurisdiction was not confined to cases occurring under commissions of bankruptcy. (See Laycock *v.* Johnson, 6 Hare, 209, 210.) But the decision in Powles *v.* Hargreaves, 3 De G., M. & G. 430, above cited, established the rule of the previous decisions in bankruptcy, as a principle of equitable jurisdiction, exercisable in all cases of the insolvency of the parties to the original appropriation, when their former interests in the fund have been so divested, conventionally, judicially, or by death, that this appropriation of it cannot be rightfully revoked or modified. The facts in Powles *v.* Hargreaves were somewhat complicated; but the decision may be regarded as having determined the application of the rule in England, where the remitter having died insolvent, his personal representative has, by answer, disclaimed all interest, and the agents have by deed assigned all their estate upon the same trusts for the benefit of their creditors, to which it would there have been subject under an administration in bankruptcy. In answer to a question by Sir Knight Bruce, one of the judges of the Court of Appeal, the counsel for the appellants admitted that if there had been no insolvency and no death, the funds would, *as between the remitter and his agents,* have been clearly applicable to the discharge of the drafts. (3 De G., Macn. & G. 441,

442.) The counsel contended that in a proceeding not in bankruptcy, the draft holders, as *third persons not privy* to the appropriation, could not assert under it an equity which the Court of Chancery would administer. But Lord Cranworth, who presided in the Court of Appeal, said that if Lord Eldon, in Exp. Waring, "did use any expression that could lead to the inference that there must be two distinct *bankruptcies* before the *principle* was applicable, it was only because bankruptcy was then in his contemplation, not that he meant it should be technically bankruptcy." Lord Cranworth had previously said: "The question can only arise where there are two estates, that of the principal and surety, both insolvent, and coming, therefore, under a forced administration. But whenever that state of things does arise, and whenever two estates are to be administered by some *vis major*, it is perfectly immaterial whether such administration is to be under the jurisdiction of the Court of Chancery or the Courts of Bankruptcy or Insolvency. Exactly the same principle becomes applicable. If it were not so, the strange anomaly would arise that the property of the depositor, instead of going, as it ought, to pay his debts, would actually be applied in payment of the debt of the depositee." Repeating that "there must be an administration of two estates, both insolvent, before this *equity of persons who have no distinct equity of their own, but which is enforced through the medium of the equity of other parties,* can by possibility arise," he added: "It appears to me that state of things did arise here." He remarked that in the case of the agents to whom the remittances were made, there was what must be treated in every respect as a bankruptcy, and that, in the case of the deceased remitter's estate, there was virtually the same thing, as his estate was, at the time of his death, totally insolvent. Lord Cranworth further said that "all the equities attaching on it must be carried into effect just in the same way as if it was an estate administered in the course of the process of bankruptcy or insolvency, or in *any other mode of* administering an insolvent estate." (*Ib.* 451, 452.)

It was adjudged, in this case, conformably to Lord Eldon's

order in Exp. Waring, that the rule of decision applied whether the remittances in value sufficed or not, for the *full* payment of the drafts. But so cautious were the Court of Appeal in confining their views of the subject within the rule of that precedent, that they hesitated in deciding even this point until after an inspection of Lord Eldon's order.

According to these decisions, mere insolvency of the drawer and the drawees, without an administration of the fund on the recognized footing of such insolvency, will not suffice to entitle the draft holders to the benefit of an appropriation originally made for the security, not of the drafts, but of the drawees as agents and intended acceptors. When, however, the interest of either the drawer or the drawees in the fund is thus administered, such an administration of the interest of the other might possibly be dispensed with, if he is made a party, and is afforded an opportunity of contesting the allegations in support of the suit, including that of his own insolvency, and an opportunity of paying, or disclaiming a purpose to pay, the drafts from other sources.

The doctrine which was applied in Ex parte Waring, and in Powles *v.* Hargreaves, has thus been fully stated, because it elucidates the investigation of questions hereafter to be determined. But neither the interest of the defendants, nor that of S. B. Ludlow, in the remittances, has been so administered on the footing of insolvency, independently of any question of direct appropriation for the security of the drafts, that the doctrine would have been applicable to the present case under any bill that could have been framed. The present bill has been several times amended. Independently of the want of S. B. Ludlow as a party, the complainants have not even averred his insolvency. Though the fact of his insolvency may have been proved, a decree upon the foundation of that doctrine could not have been made under a bill in which it is not averred. (See 3 Barb. Ch. 51; 1 Gallison, 385, 386.)

The case must, therefore, be determined upon the questions; whether there was a direct appropriation by S. B. Ludlow of

his remittances for the security of the drafts; and, if not, whether there was a sufficient appropriation by him for the security of the defendants, and an effectual appropriation by the defendants for the security of the draft holders.

The facts upon which these questions are to be determined present them for consideration in a modified and somewhat complicated form. An occurrence in the proceedings in the cause, of rather an unusual character, has rendered necessary such a statement of these facts by the court as would otherwise have been more properly contained in a master's report. (See ante, p. 51.) In the course of the narrative of the facts which will be thus judicially reported, certain propositions of law and equity requiring incidental investigation will be considered as they may occasionally arise.

Robert M. Ludlow was the father, and Samuel J. and George W. Beebee were the uncles, of R. McKinney Ludlow and S. B. Ludlow. In the years 1846 to 1850, inclusive, Robert M. Ludlow, residing at Philadelphia, and the Messrs. Beebee, who resided at New York, were in partnership as dealers in bullion and exchange, transacting their business under the names, in Philadelphia, of Ludlow, Beebee & Co., and at New York, of Beebee, Ludlow & Co. R. McKinney Ludlow and S. B. Ludlow were, at first, junior partners of the Philadelphia house, but were afterwards recognized only as clerks. In the spring of 1849, S. B. Ludlow left the concern, indebted to them on individual transactions in between $13,000 and $15,000, for which they held some securities whose proceeds, afterwards credited, reduced the debt to about $9,000. He, also, as endorser of a note of another brother, Alexander B. Ludlow, owed them $900. This old indebtment, amounting, with interest, when the bill was filed, to about $11,500, seems never to have been paid. But it was never so brought into account, or appropriated, as to become properly connected, in any manner, with any subject of inquiry in this cause.

In 1849 S. B. Ludlow went to California, taking with him

sufficient money for his personal expenses for a few months, and a small credit from his father, but no other capital. In that year he and Alexander B. Ludlow were at the mines in California, where they had a small store. In this business, if nothing was lost, no profit seems to have been made.

In the spring of 1850 S. B. Ludlow received from his father, in the latter's individual name, a letter of credit for a larger amount. He exhibited this credit at San Francisco, to Clinton Winter, a brother of one of the complainants, and proposed that they should establish there "a banking and exchange office." They established such an office accordingly, in partnership, under the firm of S. Beebee Ludlow & Co. The New York and Philadelphia houses were in extensive business, and in high standing and credit. The San Francisco house used Robert M. Ludlow's letter of credit in selling exchange. Their other business consisted in receiving and paying deposits of money, buying and selling gold dust, and lending money on interest, all on a very limited scale. Their business, though thus limited, was of good character and fair credit. This credit was founded upon their supposed connection with the New York and Philadelphia houses. The supposition arose from the similarity to the names of both, of the name under which the business in California was conducted, and from certain operations which induced a belief in a more intimate intercourse in business than really existed. They circulated a card, in which they described themselves as "bullion and exchange bankers," at San Francisco, adding, "Gold and silver and gold dust bought and sold. Advances made and insurance effected on gold dust shipped to the United States. Drafts and bills of exchange on the principal cities, and remittances made to any part of the Union, through

BEEBEE LUDLOW & CO., New York,
and LUDLOW BEEBEE & CO., Philad'a."

The San Francisco house then transacted "almost exclusively an exchange business," remitting through the New York house, to the house at Philadelphia, and drawing against the remit-

tances bills of exchange under the credit given by Robert M. Ludlow. If these bills, or any of them, were drawn upon the *house* at Philadelphia, the partners at New York do not appear to have sanctioned it, or to have known the fact. At the close of the year 1850, S. B. Ludlow & Co., though not gainers, had not been losers by their business. But S. B. Ludlow individually had lost money in other transactions in which he had engaged on his private account, having, in one such transaction alone, incurred a loss of $8,000.

On 1st January, 1851, Mr. Clinton Winter withdrew from the firm at San Francisco. On the same day, the term of the partnership at New York and Philadelphia expired, according to its original limitation. It was then dissolved by the retirement of the elder Mr. Ludlow from business at New York, and of the Messrs. Beebee from business at Philadelphia. From this date S. B. Ludlow alone transacted business at San Francisco, under the name of his former firm, S. B. Ludlow & Co. Mr. Ludlow, Senior, was in partnership at Philadelphia with R. McKinney Ludlow, under the name of Ludlow & Co.; and the two Messrs. Beebee were in partnership at New York, under the name of Beebee & Co. The business of the respective houses was, for a time, apparently conducted at the three places, as before.

The business of S. B. Ludlow, at San Francisco, was carried on from 1st January, 1851, on its former moderate scale, until after the receipt by him from the defendants, in March, 1851, of an unlimited letter of credit, in the following words:

"PHILADELPHIA, Feb. 10, 1851.

"MESSRS. S. BEEBEE LUDLOW & Co.,

"San Francisco, California,

"GN.—You are at liberty to draw on us for any amount you may require in the prosecution of your business, and your drafts will be duly honored, and this shall be your letter of credit for that purpose.

"Yours, sincerely,

"LUDLOW & CO."

In the latter part of March he published a copy of this letter of credit in more than one of the San Francisco newspapers. Before and after this publication, he exhibited to many persons, to whom he had sold his bills upon Ludlow & Co., the original letter of credit, as proof of his authority to draw.

Through the use, in these and other modes, which he made of this letter of credit, his business in exchange was greatly expanded. The testimony is concurrent that, without its aid, he could not have extended the scale of his former operations. But the notoriety of its existence enabled him to sell his bills upon the defendants, to a very large amount, at favorable rates of exchange.

All of his remittances to the Atlantic side of the continent, made after his publication of this letter of credit, appear to have been investments of proceeds of his drafts upon the defendants, thus negotiated, and to have been forwarded to the defendants, as his agents, for the purposes which will hereafter be defined. These remittances were composed of bills of exchange of other persons, upon other drawees, and of shipments of bullion. His last remittance was by the California mail of 1st October, 1851.

On the next day the news of the defendants' failure was received at San Francisco; and, according to the above-mentioned expectation, caused an immediate stoppage of S. B. Ludlow's business there. He had until then continued the negotiation of his drafts upon them, under their letter of credit.

The bills of exchange which he had remitted to the defendants were *endorsed by him to them.* The bullion which he remitted to them was intended for coinage at the Mint in Philadelphia. There was no assay office then at New York. But there was no direct intercourse between California and Philadelphia. This bullion, therefore, though intended for the defendants, as its ultimate consignees at Philadelphia, was, for convenience of transmission, forwarded by way of New York, through the agency of Beebee & Co., to whom, as intermediate consignees at that place, the bills of lading made it, in the first instance, deliverable. Beebee & Co. facilitated the transmis-

sion of this portion of his remittances, by insuring, or engaging to insure, the bullion. These insurances were a mere incident of their business as receiving and forwarding agents. The defendants repaid them the premiums of insurance, and the freights, and charged the amounts to S. B. Ludlow. *The bills of lading were accompanied by letters from him to Beebee & Co., ordering him to forward the bullion to the defendants.* Orders to this effect accompanied almost every shipment. If their transmission was, in some instances, neglected, their frequency and the uniformity of their purport when sent, sufficiently determined the course of business to regulate it in such omitted instances. There was, moreover, in each case, a *letter of advice from him to the defendants, describing the remittances as made to themselves.*

When S. B. Ludlow, in the latter part of March, 1851, published the defendants' unlimited letter of credit in the San Francisco newspapers, he appended an advertisement, in the following words:

"Exchange on Beebee & Co., New York; Ludlow & Co., Philadelphia, and at their agencies in Boston, Baltimore, Richmond, etc. Gold dust shipped and insured under their policies, at the lowest rates.

"S. BEEBEE LUDLOW & CO.,

m29-tf. *"Bankers."*

Endorsed, moreover, upon each of his bills of lading for gold dust, was a printed memorandum, subscribed by him, or on his behalf, stating that the shipment was covered by policies of insurance of Beebee & Co. The concluding clause of the advertisement did not import that the gold dust was to be shipped for the security of his exchange, mentioned in the previous clause. The apparent import of the advertisement was, on the contrary, that he proposed to make shipments of gold dust for other parties, as their forwarding agent, holding out as their inducement for employing him in this business the prospect of safe insurance at the lowest rates.

The endorsement on the bills of lading may have been intended for the satisfaction of such parties. It may, however, also have been, and probably was, intended for occasional exhibition to parties whom a knowledge of his arrangement for insurance, might induce to buy his drafts upon the defendants. Certainly, the endorsement was of no use to himself, or to the other parties to this arrangement which it attested. It must, therefore, have been intended for exhibition for some purpose in California. If it had been shown to any of the draft holders interested in the present suit, as an inducement to them to buy their drafts, the circumstance might have had an important bearing in their favor, as evidence of an intended appropriation for *their* security of the proceeds of the bullion shipped under the respective bills of lading thus exhibited. But, though there is proof in the cause that the *letter of credit* was exhibited in aid of his negotiation of his drafts, there is no evidence or allegation, and it is therefore not at all probable, that a *bill of lading* for any one of the remittances in question was ever so exhibited. In the absence of such proof, the negative must be assumed. Consequently, the memorandum on the bills of lading cannot be regarded as having had an independent effect of any kind, in favor of any of the draft holders.

Nothing else in the evidence has any tendency whatever to prove that there was, by S. B. Ludlow, an original appropriation, express or symbolical, of his remittances for the security of the drafts.

The letter of credit under which he negotiated the drafts was not an implied appropriation for their security. It conferred upon him an authority to draw, and contained, on the part of the defendants, a promise to accept his drafts. But their actual acceptance of his drafts thus negotiated could not have affected the question whether his remittances were appropriated for this purpose; and the previous promise to accept them could not, in this respect, have had a more extended operation. Indeed, in a case otherwise doubtful, the circumstance that such a letter of credit existed would, perhaps, weaken rather than strengthen the argument that there had been such an appropriation. If

the letter of credit had not authorized S. B. Ludlow to draw upon the defendants *without limit*, they might, when his remittances did not suffice to cover his drafts, have refused to accept them. In the absence of the letter of credit, these draft holders therefore might have had no expectation that the drafts would be accepted unless they were covered by his remittances. Parties who bought the drafts might then have thought the personal responsibility of the defendants of little importance. But the defendants' letter of credit bound them to such parties, to accept the drafts at all events, however his account might be overdrawn by their payment. Under this letter of credit, therefore, the drafts may have been taken rather upon the credit of the drawees personally than upon that of any remittances, made, or intended. The most favorable view of the case for the complainants, under this head, is, therefore, to dismiss, entirely, the letter of credit from consideration.

There was, consequently, no original appropriation of the remittances in question for the direct security of the drafts.*

But, as between S. B. Ludlow and the defendants, his remittances in bills, and in bullion, were appropriated for the security of the defendants.†

If the appropriation was, in fact, made by him in order to secure their advances and liabilities, the consideration to support it was amply sufficient. Indeed, he was under an obligation to provide, in this respect, adequately for their security. It has been stated that their letter of credit was a promise, on their part, to honor such drafts as might be negotiated under the authority which it conferred. According to the decisions reported in 4 Peters, 121, 122; 1 Story, 28, and 11 Mees. & Welsb. 390, 391, it was not a legal acceptance, by anticipation, of such drafts. But, for any breach of the *promise to accept*, the defendants would be suable by the respective parties who,

* See ante, p. 12, 2d proposition.

† See below, and also p. 12, the 4th proposition, and the first paragraph of the 5th.

on the faith of it, bought the drafts. (2 Casey, 87.) So far as *third persons* were concerned, the authority to draw which it conferred was *unlimited*. The defendants were liable, therefore, to the respective parties who bought the drafts from him whether payment of them would overdraw his account or not. As between himself and the defendants, their engagement was not thus absolute and unlimited; but was conditioned only, depending upon his not overdrawing his account. He was not justifiable, under the letter of credit, in drawing upon them unless he kept them *in funds* to meet his drafts at maturity, or, at all events, kept them adequately *secured* by his remittances. In the correspondence, his obligation to cover their liabilities by seasonable remittances was recognized on his part. We have seen already that if the existence of such an obligation had not been thus indicated, it would, under known rules of commercial law, have been implied. (See 1 Peters, 290; Baldw. 538, 2 Mylne & Cr. 405.)

The correspondence which manifested his *obligation* to secure to the defendants their indemnity and reimbursement, showed also his *purpose* to do so. The consideration being sufficient, this manifestation of the purpose would alone have sufficed to create the intended security. But the purpose was also carried into effect, in every instance, by a distinct act sufficient in itself, as an appropriation of each remittance.

It has been stated that the bills of exchange which he remitted were endorsed by him to the defendants. From the time of the transmission of the bills thus endorsed, the defendants alone could control the disposition of them. So soon as the endorsed bills, enclosed in the respective letters remitting them, were on the route by mail, they were effectually appropriated for their intended purpose of securing the defendants. The result was, in this respect, the same, whether the bills thus enclosed were endorsed specially to the defendants, or in blank. The qualified interest in the bills required for their security was in either case vested in the defendants from the commencement of the transit.

The mode in which the bullion was remitted has also been

particularly described, and the character as well as purpose of Beebee & Co.'s interposition by the remitter, as his receiving and forwarding agents at New York, fully stated and explained. Had the bills of lading made the bullion deliverable to the defendants or to their order, they would have acquired in it, when on shipboard, the qualified property required for the security of their advances and liabilities. If the bills of lading had been drawn or endorsed in blank, and, in this transferable form, had been transmitted to the defendants, the appropriation would not have been less immediate and effectual. This the above-cited case of Haile *v.* Smith, 1 Bos. & Pul. 563, sufficiently proves. On the other hand, the case of Kinlock *v.* Craig, 3 Durnf. & E. 119, 783, which has also been cited, and Nichols *v.* Clent, 3 Price, 547, show that if the bullion had, under bills of lading or otherwise, been deliverable to a middleman for any purpose other than that of immediate single transmission to the defendants, they would have acquired no property in it until the fulfilment of the condition, express or implied, of which the middleman's intervention was intended to secure the performance; and also show that if, without any such intervention of a middleman, the bills of lading had made the bullion deliverable to the remitter's own order, and had been transmitted without his endorsement, the defendants would have acquired in the bullion, during the transit, no right or interest which would not have been revocable by the remitter.

But in the case before the court, the effect of the bills of lading, which made his bullion deliverable to Beebee & Co. as intermediate consignees, was determined by his accompanying orders to them to forward it to the defendants. Without any such accompanying orders to Beebee & Co., a like effect would have been attributable to his letters of advice to the defendants. The bills of lading, the accompanying orders to Beebee & Co. as forwarding agents, and the letters of advice to the defendants, constituted *in connection* the *proprietary documents* of these remittances. *The effect of these documents was the same as if the bills of lading had made the bullion deliverable directly to the defendants themselves without any intervention*

of Beebee & Co. This is proved by the authorities already cited from 8 Howard, 399; 10 Bingh. 246; 4 Mees. & Welsb. 791; 2 Hill, 147; 24 Wend. 173; I Curtis, 130.

These authorities would at all events have thus disposed of this particular question if the defendants had been able to continue, notwithstanding their failure, to honor the drafts on presentment. Their inability to continue to do so renders an investigation of the state of their accounts with S. B. Ludlow necessary.

The profit or loss of his business in exchange depended upon the avails of his remittances, which, to the extent of their amounts or values, enabled the defendants to pay his drafts upon them, or to reimburse their payments of such drafts. During the nine months of 1851 in which his business was continued at San Francisco, he was a loser to a small amount on his banking operations. On his transactions in exchange during this period, he gained, according to his own estimates, about as much as he lost. His losses in the banking business, added to his heavier losses of the previous year, and his expenses of living in California, occasioned a deficiency in his remittances of which the value was therefore inadequate for the security of his drafts upon the defendants. His account with them was consequently overdrawn at the time of their failure.

At the close of 1850, his former house of S. B. Ludlow & Co. had owed to the former Philadelphia house of Ludlow, Beebee & Co. a balance of $2,834.92. This balance Ludlow & Co., on 1st January, 1851, transferred and charged to him in their new account then opened. The latter account contains also a similar charge under date of 6th January, 1851, of two sums, together $2,570, transferred from a prior account of 27th December. These amounts, in all $5,404.92, resulting from his former business, do not appear to have represented the whole of his losses prior to 1851.

The following transactions of the defendants with S. B. Ludlow, or on his account, from the commencement of 1851 appear upon their books.

In addition to the above-mentioned old items, together		$5,404 92
they charged his drafts paid by them to the amount of		87,563 59
And their payments of insurances, $1,783.99, freight, $533.56, a protest, $3, and balances of interest, $385.67, together		2,708 22
Total debits		$95,676 73
They credited, as avails of his remittances, the following sums:		
Received early in 1851, from remittances of the latter part of 1850	$5,657 59	
Received from remittances of 1851	69,069 47	
Total credits		$74,727 06
Leaving to the defendants' credit on 25th August, 1851, the day of their failure, a cash balance of		$20,949 67

The correctness of the accounts, resulting in this balance, has not been disputed.

They had, until then, accepted and punctually paid all of his drafts upon them. They then ceased so to do, refusing to pay two, for $2,500 each, held by the complainant Hopkins, falling due on that day. If the arrival of a remittance had not been delayed by a casualty mentioned below, the balance due to them in cash account would have been smaller by several thousand dollars, and they would probably have been able to take up these two drafts, and, perhaps, continue their payments a little longer.

None of the items of charge or discharge, in their account from the commencement of 1851, which is analyzed above, are disputed. This account had been twice balanced. At these rests, and at that of 25th August, it contained no charge for compensation of any kind. If he had not unauthorizedly

overdrawn it, their course of business with him, therefore, would not have warranted a charge of any commission for the transaction of his business. But the excess in amount of their payments beyond receipts had been progressively increasing in this year. Since its commencement, the average balance in which they had been in advance on cash account had been about $13,460, upon an average addition, monthly, of about $1,000 to the sum of the old balances. On 26th August, 1851, the day after that on which their account was balanced as above, they made a charge against him of $673 for *commission,* without stating the rate, or on what amount, or amounts. It was probably intended as a charge of five per cent. on the average amount in which they had been in advance as above, on cash account for eight months, equal to 2½ per cent. on an advance of their acceptances at four months to that amount once renewed. According to usages in transactions not dissimilar, which will be mentioned hereafter, the charge, though made at this late stage of the business, was, perhaps, under the circumstances of the case, admissible. *It is the last entry of any kind upon the books of the defendants in account with S. B. Ludlow, or with any other person.* With its addition, the balance due by him to the defendants on general account, at the time of their failure, was $21,622.67.

The value of his remittances then arrived of which the avails in cash, or its equivalent, had not been credited in this account, will appear upon a comparison of the credits in it with the aggregate of his remittances by such previous mails as had reached their destination.

By the mail of the middle of June, he had forwarded two certificates of deposit, which were credited by the defendants on 6th August, and two bills of lading for gold dust, one by the California for $4,500, which arrived before 28th July, and the other by the Stockton for $4,720, which did not arrive until about 11th August.

By the mail of 1st July, he had remitted a small draft at sight on Philadelphia, and a bill of lading by the Union for $13,308.40 in gold dust. The draft was credited by the de-

fendants under date of 7th August, at about which time the bill of lading arrived without the gold dust. The Union "was lost in her downward trip," and though the gold dust was saved, it did not arrive at New York until 25th August, 1851, the day of the defendants' failure; and its safety was not known at Philadelphia till the 26th.

By the mail of the middle of July, S. B. Ludlow remitted a draft at three days' sight for $1,200, in coin $207.55, and in gold dust $6,011. The draft was paid at New York on 19th August, and was credited by the defendants at Philadelphia on the 20th. Allowing the days of grace, it must have been presented on the 13th, on which day the coin and gold dust were doubtless at hand.

By these three mails, the remittances in gold dust and coin had thus been in amount, or value, exclusive of the excess of the mint certificates above the California values.. $28,746 95

On account of which the only credits in the defendants' accounts were of the following dates, and amounts, in Mint Certificates:

28th July	$4,825 96	
21st August	5,145 21	
25th "	4,337 30	
Together	———	$14,308 47

The difference was an amount in gold dust of $14,438.48 and probably of a value somewhat greater.

This difference included the delayed shipment of $13,308.40 by the Union, which was described in S. B. Ludlow's letters as of that amount, as $13,300, and as $13,000. The excess remaining uncredited may, perhaps, be explained by referring to the circumstance that a note for $1,500, due by parties in California to parties in Philadelphia, had been sent for their account by the defendants to S. B. Ludlow for collection. He had, by the mail of the middle of July, informed them of its receipt, and they were, doubtless, at the time of their failure,

in expectation of intelligence, which actually came by the next mail, that he had collected its amount. After deducting a commission, and the difference in exchange, it would net in Philadelphia about $1,455. An amount about equal, to be paid to the owners here of the note on the receipt of such intelligence, may, perhaps, have been retained by the defendants out of S. B. Ludlow's gold, without being credited to him in general account.

Deducting from the balance of his debit in general account with the defendants, which was.....	$21,622 67
the value of the bullion arrived, but not credited, which was about.....	14,438 48
the difference	$7,184 19
represents about the deficiency in his remittances, estimating this bullion as cash.	
The amount payable to the owners of the collected note for $1,500, say about.....	1,455 00
increased the deficiency to about.....	$8,639 19
The payment of the two drafts falling due on the day of the defendant's failure for together....	5,000 00
would have increased it to about.....	$13,639 19

This, as we have seen, had been about the average of a progressively increasing deficiency. It had continued to increase, notwithstanding repeated promises in his letters to reduce or discharge it, and to cover adequately his drafts by remittances. Other acceptances were soon to fall due. No remittance was to be expected for ten days, and as fresh drafts always appeared upon the arrival of each California mail, no relief was to be expected on the receipt of a remittance.

This was the condition of the business on the day of the defendant's failure. The amount of his drafts upon them then and afterwards falling due, exceeded, by several thousand dollars, the value of his remittances which afterwards arrived.

The aggregate amount of his drafts upon the defendants in the year 1851 has been stated as $171,305.08.* In this year the defendants paid his drafts to the amount of $87,563.69, leaving, if the above aggregate amount is correctly stated, accepted and unaccepted outstanding drafts to the amount of $83,741.39. The amount cannot be precisely ascertained otherwise than under a future order of reference. But in the present review of the facts, the amount of his drafts upon the defendants which they did not pay may be regarded as about $84,000.

The amounts or values of his remittances which arrived after August, 1851, and the dates of their arrival, were as follows:

TIMES OF ARRIVAL.	REMITTANCES.		TOTALS.
	In Bullion.	In Bills.	
About 5th Sept., 1851.....	$15,303 50	$12,000 00	$27,303 50
" 20th " "	6,105 37	6,500 00	12,605 37
" 5th Octbr., "	2,632 91	20,000 00	22,632 91
" 18th " "	2,559 53	6,000 00	8,559 53
" 7th Novr., "	.....	8,000 00	8,000 00
	$26,601 31	$52,500 00	$79,101 31

The value of the bullion arrived but not credited, and of the bullion and bills which arrived afterwards		$14,438 48 79,101 31
were thus, together, about.....		$93,539 79
The insurances not charged.....	$982 14	
and freights " "	247 80	
were, together		1,229 94
Of the net value, about.....		$92,309 85

* $176,710 00
5,404 92
$171,305 08

the amount required for the payment of the above collection of $1,500 was about.....	1,455 00	
leaving about		$90,854 85
Out of which was to be paid the balance due to the defendants in general account.....	21,622 67	
so that there was.....		$69,232 18

or thereabouts, to meet the drafts outstanding, of which the amount was about $83,741.39. The deficiency was thus about $14,509.21, increased somewhat by interest and a little reduced by the gain, on a part of the bullion, of the differences in amount between the mint certificates and the California values.

The following is a recapitulation, showing the deduction of this result:

Old account.....	$5,404 92	Proceeds of old remittances	$5,657 59
Drafts paid by defendants	87,563 59	Proceeds of remittances of 1851, credited.....	69,069 57
Charges paid by defendants	2,708 22	Remittances arrived but not credited at end of August, 1851.....	14,438 48
Their charge for commission	673 00	Remittances which arrived afterwards.....	79,101 31
Payment of net collection of $1,500 (about)	1,455 00	Deficiency	14,509 11
Insurances and freights not charged.....	1,229 94		
Drafts remaining unpaid	83,741 39		
	$182,776 06		$182,776 06

We may say, with a sufficient approximation to correctness, that there was in value about $69,000 to meet drafts to the amount of about $84,000, and that the deficiency was thus about $15,000.

This having been approximately ascertained, the effect of the defendants' refusal, on and after 25th August, 1851, to honor the drafts, may be considered.*

We have seen that S. B. Ludlow's remittances, though their

* See ante, p. 13, under the 8th head.

nominal amount or value had been received by the defendants in cash, or its equivalent, without impediment or delay, would have fallen short by several thousand dollars of the sum required in order to reimburse their advances and enable them to continue the punctual payment of his drafts. His account, when the first of his bills was dishonored by them, had already been so overdrawn that the relation of debtor and creditor had been established between him and the defendants. This relation, so far as their intended indemnification was concerned, had already been substituted for, or superadded to, that of principal and intended sureties. Their engagement to honor his drafts had been made upon the faith of an expectation of receiving from him remittances of amount or value sufficient, after payment of any balance due to them in general account, to indemnify them against their intended liabilities. As between him and them, his failure to keep them thus adequately secured and indemnified is to be deemed the cause of their not having continued punctually to honor his drafts. The dishonor of the drafts involved them, under their letter or credit, in liability to third persons. But this was attributable, as between him and them, to no default on their part. It was the result of the inadequacy of his remittances. He could not have maintained an action against them for not honoring the drafts without showing that he had kept them indemnified against such liability as would have been incurred by them in so doing.

The effect of the defendants' refusal to honor the later drafts will first be considered as if the letter of credit under which they were negotiated had not existed. The case, thus considered, was the ordinary one of remittances to agents made, as well for the remitter's own expected profit, as to secure their advances, and indemnify them against their accrued and accruing liabilities for his account. If they had never honored any of his former drafts, and had neither been in advance to him nor under pre-existing liabilities for him, the case would have resembled that of a single remittance to an agent who refuses to honor the remitter's bills drawn against it. The case would,

in principle, have been the same, if, when the defendants refused to honor his later drafts, their prior advances and liabilities had been adequately secured by his previous remittances. The relation of sureties entitled to indemnification would not then have arisen in their favor as to the remittances which arrived subsequently. So far as their indemnification was concerned, the purpose of the intended appropriation would have ceased to exist, and the *consideration of its irrevocability* by the remitter would have wholly failed. Had the present case been one of this character, the defendants' refusal to honor his later drafts would, therefore, have rendered the subsequent delivery of his remittances to them countermandable by him. He could have revoked the intended appropriation of the remittances, and have resumed the possession of them, or have changed their destination. Any such resumption by him of possession, or change of destination, would have operated retroactively as an annulment of the appropriation from its date; and its effect would have been the same, in this respect, whether it had preceded or followed the dishonor of the drafts, if they were in fact dishonored.

But in such cases the remitter's interest in the previously intended appropriation may require that, notwithstanding the dishonor of his drafts, the original purpose of the appropriation shall be fulfilled by the application of the proceeds of the remittances to the payment of the drafts. This interest might be defeated, in certain cases, to his great injury, if the acceptance of his drafts by the agent were a condition precedent, on which alone the appropriation of his remittances was dependent. It is not legally such a condition. The appropriation, though revocable, is not annulled without an act of revocation on the part of the remitter.

In the present case, S. B. Ludlow never changed the destination, resumed the possession, or otherwise countermanded the delivery of his remittances. Therefore, if their appropriation *had* been *revocable* by him, it never was *revoked*. Consequently, the right of the defendants to receive the remittances under it could not have been disputed by middlemen, like

whom the action was brought for its non-delivery to the plaintiff. The defence was that the plaintiff, by refusing to accept the bill for £500, had refused the shipment, and that as the consignment was to have been sold on Orr's account, the property in the butter had never passed out of him, and he might countermand its delivery. This defence would have prevailed if the consignment and the draft had composed an isolated transaction. But the plaintiff recovered. The court were of opinion that though he "might not have an absolute property in the goods * * * he had a sufficient qualified interest in them, in the way of security, to entitle him to sue on a breach of contract for non-delivery." Parke, B., afterwards referring to the "principle upon which he knew" that this case "was decided," said that the "bill of lading, making the goods deliverable to a factor, was, upon proof from correspondence of the intention of the principal to vest the property in the factor as a security for antecedent advances, held to give him a special property the instant the goods were delivered on board" of the ship. (4 Mees. & Welsb. 792.) The authority of Anderson *v.* Clark is also recognized in Grosvenor *v.* Phillips, 2 Hill, 152.

Unless a condition that the property in such remittances shall not vest until the acceptance of a draft or drafts is imposed, or their acceptance constitutes the *whole* consideration of the right of the intended receiver of the remittance to security, the dishonor of the drafts does not prevent such a property from thus vesting.

In the present case, the question has hitherto been considered independently of any particular effect attributable to the letter of credit under which the drafts were negotiated. We have seen that the dishonor of the later drafts by the defendants was, when it occurred, excusable, and even justifiable, as between them and the drawer, who, therefore, could not have revoked his appropriation of the remittances for their security. The effect of the letter of credit, under this head, will next be considered.

Its effect, perhaps, was that, although the defendants had even been adequately secured by seasonable remittances, and

the dishonor by them of the remitter's drafts had, consequently, been inexcusable, the appropriation of the remittances would, nevertheless, have been irrevocable by him. When he negotiated the drafts, he obtained value for them on the Pacific side of the continent, through the use of the defendants' credit. The defendants, at the same time, incurred a liability under their promise to honor the drafts, contained in their letter of credit. Their failure to incur, according to this promise, an additional or modified liability, as acceptors of the drafts, did not, therefore, it would seem, affect the *whole* consideration of the intended security. Their liability to suit for breach of this promise continued, and was, in itself, a subsisting part of the consideration. If so, the appropriation of the remittances for their security would, perhaps, not have been revocable. The precise case may not have been adjudicated; but there have been decisions approaching, in principle, the determination of the point very nearly. The ownership of goods delivered, under a contract of sale, to a carrier for transportation to the purchaser vests immeditely in the purchaser, subject only to the seller's right of stoppage in transitu. Though the purchaser becomes insolvent, or even bankrupt, before their delivery, and refuses to accept a bill drawn for the price, in pursuance of the contract, or has failed to remit, according to its requirement, a banker's bill for the price, the seller, who has not been able to stop them in transitu, cannot resume the possession. The suggestions of a contrary tendency by Lord Kenyon, and Ashurst, J., in Tooke *v.* Hollingsworth, 5 Durnf. & E. 226, 228, were certainly rejected in the Exchequer Chamber, where that case was finally decided (2 H. Bl. 502), and have been overruled in Wilmhurst *v.* Bowsher, (7 Mann. & Gr. 882,) and Heinekey *v.* Earle, (8 El. & Bl. 410, 422,) both in the Exchequer Chamber, and the intervening cases of Key *v.* Cotesworth, (7 Exch. 595,) and Gurney v. Behrend, (3 El. & Bl. 633.)*

In these cases, the insolvent buyer was liable to an action upon

* See also Browne *v.* Hare, 3 Hurlst. & Norm. 484, 497.

his promise to remit in the one case, and to accept in the other case; and the property in the goods vested in him, in consideration of this *promise.*

The only difference between some of the cases thus decided and the present case is, that the property which was there vested was an absolute ownership, while here it was a qualified interest for the particular purpose of the intended security. The principle appears, however, to be applicable alike, if its foundation is that the consideration of the act of appropriation does not *wholly* fail.

The present case may, however, for the reasons already stated, be determined under this head on the more simple ground that the remittances were intended as a security for *past advances* and for liabilities *already incurred,* as well as for accruing liabilities. On this point the case of Anderson *v.* Clark* is a sufficient authority for the determination of the question.

Consequently, notwithstanding the dishonor of the later drafts, the remittances were appropriated for the security of the defendants in such a manner that S. B. Ludlow could not, after the commencement of their transit from California, have countermanded their delivery to the defendants, or have otherwise annulled their appropriation without the consent of the defendants, unles he paid the drafts from other sources. He and the defendants, by any *concurrent* act not voidable on the ground of covin and fraud, could have made a different disposition of the remittances which would have been effectual against the draft holders. But an appropriation of any one or more of the remittances for the security of the drafts made at any time after the commencement of the transit, by him alone, or by the defendants alone, would, as has already been stated, have constituted an effectual security for the draft holders. If made by the defendants alone, S. B. Ludlow could not, as has also been stated, have annulled it without paying the drafts himself.

* 2 Bing. 20, and 4 M. & W. 792, cited ante, pp. 95, 96.

If any of the drafts had been given directly for the price of any bullion remitted by him to the defendants, it might, upon their insolvency, have been stopped in transitu by, or for the benefit of, the payees or endorsees, at any time before its delivery to the defendants. But this right of stoppage in transitu could not in that case have been exercised at any time after its receipt by the defendants or their agents. If the right was not seasonably exercised, the circumstance that it *might* have been so exercised would have *afterwards* been immaterial. His remittances having, however, been bought, as has been stated, with proceeds of sales of the drafts, cannot have been paid for by the drafts themselves. Therefore, no question of stoppage in transitu could have arisen out of these transactions *even as to such of the remittances as did not arrive until after the bill in this case was filed.*

The sole recourse of the complainants, therefore, was in such appropriation, if any, of the remittances for the security of the drafts, as might have been effectually made while the remittances were in transit, or after their arrival.*

The delay which occurred in the arrival of the bullion invoiced at $13,308.40, shipped by the wrecked steamer Union, has already been mentioned as having prevented the receipt of this remittance by the defendants before their failure. Under the arrangement between S. B. Ludlow and Beebee & Co., as to insurance, this amount, if the bullion had been lost, would have been covered by Beebee & Co.'s insurances, or Beebee & Co. would have been liable to him for neglecting to effect insurance. While its fate was, perhaps, yet uncertain, an arrangement for its appropriation was made by the defendants with Beebee & Co., to whom they were indebted in a much larger amount.

This arrangement was of the effect stated in the following letter:

* See ante, p. 16, the concluding paragraph under the 10th head.

"PHILADELPHIA, Aug. 16th, 1851.

"MESSRS BEEBEE & Co.,

"New York.

"You will please receive and place the proceeds of the bill of lading for thirteen thousand dollars in gold dust, which bill of lading you held, to the credit of our account for moneys advanced S. Beebee Ludlow & Co.

"LUDLOW & CO."

The meaning of this was that Beebee & Co. should credit the amount of these proceeds to their debtors, Ludlow & Co., by whom the same amount should be thereupon credited to S. B. Ludlow in reduction of his debt to them in general account. But, if the gold dust should come to hand, the liquidation of the credit was to be made by the mint certificates. Consequently, no entries of the transaction had been made in the books of the parties at the time of the defendants' failure.

After the arrival at New York of the $13,308.40, described in this letter as $13,000, another appropriation was made by the defendants, in the form of an order on Beebee & Co., in the following words:

"PHILADELPHIA, August 29th, 1851.

"MESSRS. BEEBEE & Co.,

"New York.

"Please to pay over to the order of Messrs. Willis & Co., of Boston, out of any proceeds of gold dust you may receive from S. Beebee Ludlow & Co., of San Francisco, for our account to the amount of eight thousand three hundred and two dollars and sixty-three cents.

"$8,302.63. LUDLOW & CO."

This order was handed to Willis & Co., as the defendants, on the day of its date, by letter, informed Beebee & Co. The order, endorsed by Willis & Co., was, on the 30th of August, endorsed by them to Beebee & Co., with a request that its amount might be credited to them on account.

The two appropriations by the defendants for $13,308.40 in favor of Beebee & Co., and $8,302.63 in favor of Willis & Co.,

were on account of debts of their own to these respective parties. S. B. Ludlow was not privy to these debts, or, in any manner, interested in their discharge. But this was apparently immaterial, as both appropriations were apparently covered by the balance of $21,622.67 to the credit of the defendants in general account with him.

The bullion on hand at Philadelphia at the time of their failure did not more than suffice for the payment of the collection of $1,500. The mint receipts for the bullion by the Union, invoiced as $13,308.40, show that it produced in coin $14,115.66. This amount was credited by Beebee & Co. to the defendants on 5th September, 1851. The defendants were not immediately advised of this credit. A corresponding credit on their books to S. B. Ludlow was never made. Such a credit would have reduced the balance due by him to the defendants in general cash account to between $7,500 and $7,600.*

The order of 29th August, 1851, in favor of Willis & Co. for $8,302.63, was, on its face, payable out of the expected remittances in bullion that might arrive after its date at New York. There was, at its date, no fund on hand at New York or Philadelphia for its payment. When the first of the remittances which afterwards arrived reached New York no more than between $7,500 and $7,600, was properly payable on account of this order, because no more was covered by the reduced balance then due to the defendants. But, for the present, the small difference in amount may be disregarded. According to the aspect of the accounts at the close of August, 1851, bullion to the value of $8,302.63 was to be retained at New York, by Beebee & Co. for Willis & Co. out of the first remittance that might afterwards arrive; and the residue of the remittances, on their arrival at New York, should have been immediately forwarded by Beebee & Co. to the defendants at Philadelphia.

This was the state of things when, on 1st September, 1851, the defendant, Robert M. Ludlow, subscribed the name of his firm to a writing of the following effect:

* See ante, p. 89, about $8,639.19, less $807.56.

"We hereby assign over to William Taylor, of Philadelphia, any gold dust, coin, or drafts, that S. Beebee Ludlow & Co., of San Francisco, California, may send to us for their account. First, for the purpose of paying their balance due us, and our acceptances of their drafts on us; and second, for the payment of their sight-drafts and time-drafts on us: which you will please collect and hold, for the purpose of making a pro rata dividend to the different parties as above holding said drafts. And you will also take possession of any gold dust shipped by S. B. Ludlow & Co. to our care for other parties, and deliver the same to them, as our agent.

"Philadelphia, Sept. 1st, 1851:

"LUDLOW & CO."

The defendants took immediate measures to procure S. B. Ludlow's ratification of this act; but we have, unfortunately, a small part only of their correspondence of September, 1851. The bill interrogated the defendants what correspondence they had had with S. B. Ludlow, and with Beebee & Co., respectively, concerning the drafts and the remittances, and concerning the provision to be made for the payment of the drafts out of the remittances, and what correspondence they had had with S. B. Ludlow "touching the reception, *disposal,* and present custody or possession of the" remittances; requesting the defendants to append copies of the respective corespondences to their answer. They did not append any copies of letters, alleging, as a reason, that their correspondence with neither of the parties indicated or referred to any *special* appropriation of the remittances. After mentioning their letter of credit, authorizing S. B. Ludlow to draw on them, they stated that there had not been any correspondence between him and them respecting the drafts and remittances, other than that they were usually advised by him of his drafts upon them, and of the amounts of his shipments to them, "except certain letters, containing, *besides,* family matters unconnected with said drafts or shipments." They added that their letters to him were not copied, as they were "*generally* on family matters," and that

"the corespondence with Beebee & Co." was "of the same general character, except where connected with other subjects." The answer was entirely silent on the subject of any correspondence concerning the paper of 1st September, 1851. A sufficient length of time for the receipt from S. B. Ludlow of a reply to any letter from them upon the subject had not elapsed when their answer was filed. But their duty had required them to apprise him promptly of any act of such importance in the business of their agency; and the evidence is very distinct that they had not neglected the performance of this duty.

This evidence discloses the fact that all of their letters to him, written before the 24th of September, 1851, have, at their suggestion, been destroyed by him, under circumstances of great culpability, which will hereafter be stated. The correspondence of a commercial agency forms a part of the muniments of the title, so to speak, of the property to which it refers. The wilful destruction of such a correspondence brings a case in which it occurs within rules of evidence as to the *spoliation of papers,* which justify, against parties guilty of it, and in favor of other parties interested, "the utmost latitude of presumption" from such secondary and otherwise inferior evidence as may be accessible. The decisions of courts of equity upon the subject were collected and reviewed by this court in 1 Baldwin, 388-391. The suppressions and evasions of the answer in the present case make it a peculiarly strong one, in this respect, against the defendants, as parties whose relation to the subject was fiduciary.*

The defendants' letters to S. B. Ludlow, written in September, 1851, which have been destroyed, were dated on or about the 1st, 9th, 11th, and 12th of that month. Of some of them, duplicates—also destroyed—were sent. The contents of the first of these letters are proved in part by Clinton Winter, who, after deposing that "intelligence of the failure of Ludlow & Co. was received at San Francisco on the 2d of October, 1851," i. e., by the mail of the beginning of September, testified that "S. B.

* See ante, p. 17, last paragraph under 11th head.

Ludlow received, simultaneously with receipt of intelligence of the failure of Ludlow & Co., a letter from Robert M. Ludlow, dated Philadelphia, September, 1851, stating that Ludlow & Co. had made an especial assignment of his remittances to one William Taylor for the benefit of his creditors, and that he had better confirm it; that his interests were fully protected, and that he might assure his creditors" in California "that they need be under no uneasiness, as all his drafts would be paid to within, perhaps, ten or fifteen cents on the dollar." That this letter or another of the destroyed letters, communicated to him the contents of the assignment with more fullness and precision than this witness, from recollection, states them, is indicated in a letter of S. B. Ludlow, written after his receipt of the intelligence communicated. This letter, which is an important paper in the cause, was in these words:

"SAN FRANCISCO, Oct. 14th, 1851.

"MESSRS. LUDLOW & Co.

"GENTLEMEN:—The funds sent on to you by us, and what we have remitted you since your failure, will, of course, be taken by you, or your assignee, to pay off what the house here, S. Beebee Ludlow & Co., may owe you, together with what acceptances you may be under for us before our other liabilities may come in, or rather *after your claim against us, is satisfied,* then we *presume* and *wish that all acceptances of ours against you will come in.* And after that, all drafts that may appear subsequent to your failure to be paid pro rata out of the balance of the funds to our credit.

"We are in hopes at least you have taken care of our friends Winter and Latimer first above all. Also that *in case funds may be laying to our credit, and that you have not paid these drafts, then let this be your order to do so,* or to what part of the amount of funds may be due them.

"We are very respectfully your ob't servants,

"S. BEEBEE LUDLOW & CO."

If the complainants, Winter, Latimer & Co., were not secured, in common with other holders of the drafts, in the man-

ner set forth in the previous part of this letter, the concluding part of it had the effect of creating a *particular* security for the benefit of *these* complainants. But the proper effect of the letter was not so restricted as to render it thus operative for their benefit alone.

The coincidence between the general appropriation of the remittances which it assumed to have been made, conformably to the writer's own wishes and sense of justice, and the appropriation of them by the paper of 1st September, 1851, was complete. The letter, if interpretable without reference to the proof that the existence of that paper had already been made known to the writer, was an unequivocal admission by him that the defendants had been authorized to execute precisely such a paper. This recognition by him of such a pre-existing authority would then be evidence that the authority had in fact existed. But if he was mistaken, and it had not existed, his admission that it had, was either a ratification, or such a dispensation with one as was of equivalent effect. When an act, already performed, is of such a character as to be voidable by a party who does not know whether it has been performed or not, his recognition of it as valid, if performed, must have one or the other effect.

But the letter, interpreted, as it should be, with reference to the fact that, when it was written, the existence of the assignment had already been made known to the writer, shows that he knew also the precise contents, or precise intended effect, of the assignment. The letter, thus interpreted, was a direct ratification by its writer of the assignment. If he knew its intended operation, as his letter then shows that he did, the form of the language of the letter is immaterial. That the letter stated no objection to the act sufficed, then, to render it an effectual adoption. As between a principal and his agent, who has performed an unauthorized act, if the principal, when informed of it, makes no objection, his mere silence is a ratification.

Every ratification, whether tacit or express, operates, between the parties to it, and *in favor* of other persons, retrospectively,

so as to take effect from the date of the act ratified. This letter of 14th October, 1851, had, therefore, *in favor of the draft holders* mentioned in the appropriation of 1st September, 1851, the same effect *against the defendants and S. B. Ludlow* as if he had subscribed this appropriation on the day of its date.

But this letter of ratification was not written in California until six days after the filing of the original bill in this cause. It was not, by due course of mail, receivable in Philadelphia until about the 20th of November, 1851, which was nearly a fortnight after the arrival of the last of the remittances at New York. Though the ratification was, *between the parties,* retroactive, the paper of 1st September, 1851, was *against other persons,* inoperative *as an act of S. B. Ludlow* until his ratification. This paper was, in the meantime, for practical purposes, effectual only as the creation *by the defendants* of a trust for the security of the drafts. This trust, independently of the subsequent ratification, took effect in favor of the draft holders no further than it could be executed through rights exercisable by, or interests vested in, the defendants themselves.

The defendants, as agents of S. B. Ludlow, could not, without his authority, lawfully delegate the performance of any other than ministerial duties of their agency to another person. (11 Howard, 223, 224.) They could much less, without his authority, substitute for their own agency under him such a trust as to his remittances, permanently vested in another person, as this paper purported to vest in William Taylor as assignee. S. B. Ludlow's ratification of the paper was, therefore, indispensable to its *complete* validity as an *assignment.**

But the paper, *so far as the defendants themselves were concerned,* was not imperfect or incomplete.† It required on their part no act in order to render it effectual for its intended purpose. So far as *they* were concerned, it was, therefore, a valid act *from its date.* Upon the question whether it might not, as

* See ante, p. 17, the 12th proposition.

† See ante, pp. 17, 18, the 13th head.

a valid *assignment,* have taken complete effect without S. B. Ludlow's ratification, three propositions have been assumed, rather than discussed in the course of the arguments of counsel. These propositions are: the first, that when the ultimate avails of the remittances in cash, or its equivalent, had been duly credited by the defendants in account, if the balance of the account had at any time been in their favor, they would, while his debtors for such balance, have had a right of using its amount as their own; the second, that this right continued to exist, as between him and them, after they had ceased to honor his drafts; and the third, that while it subsisted, they had, in consequence of its existence, an absolute property in the remittances even before the avails in cash or its equivalent were credited.

The third proposition would not follow as a consequence from the establishment of either or both of the others. Unless it should be established, the others are of little importance.

The second proposition is not a necessary consequence of the establishment of the first. After these remarks, the three propositions will be considered in succession.

The first proposition, disconnected from the others, is resolved in the answer to the question whether, when the ultimate avails of the remittances had been duly credited by the defendants in account, if the balance had, at any time, been in S. B. Ludlow's favor, they would, while his debtors for such balance, have had a right of using its amount as their own, so long as they continued to accept his drafts with an intention of paying them at maturity, and fulfilling all essential duties of their agency. The determination of this question depends in part upon an ascertainment of the legal denomination or character of the defendants' agency.

The defendants, if not S. B. Ludlow's general agents on this side of the continent, were his agents to turn his remittances to account for his profit, pay his drafts negotiated under their letter of credit, and attend, for some other purposes, to his interests. The remittances were of a determinable value, and readily convertible into money. He wrote to the defendants

that, in their occasional estimates of the balances of his account, they should take into consideration the gold dust that they might "have on hand not coined," which was "the same as cash." Within two or three days of the times of depositing this bullion for coinage, the mint certificates for the respective *precise* values, differing very little from the California values in the invoices, were always receivable. His remitted bills had usually a few days only to run. The defendants' accounts for 1851 contained only one charge for a protest, which was more than four months before their failure.

As far as third persons were concerned, the character of these remittances defined the authority of the agents, without reference to the mode in which the business was to have been conducted between them and the remitter. Persons who knew that the defendants were his agents, and that particular bills remitted by him were subjects of their agency, might receive them from the defendants without inquiring whether they had been discounted, or what was the state of the defendants' account with him, or whether the disposition of the bills was, between him and the defendants, proper. If the persons receiving the bills were not privy to some actual wrong, such persons would acquire the same title to them as if the defendants were owners of them instead of mere agents. Though, as between the defendants and S. B. Ludlow, their transfer bills might be a malappropriation, the rule as to transfers by bankers laid down in 1 Bos. & Pul. 648; 1 Rose, 238; 19 Ves. 38, would apply. The remitter could not follow them, or their proceeds, into the hands of parties not actually privy to the malappropriation, as the owner of merchandise consigned to a factor can, in certain cases, follow it or its proceeds.

Even as between S. B. Ludlow and the defendants, though they were not simply his bankers, but in part his factors, the rule of their conduct as to his remittances might, in some respects, depend upon their determinable value and ready exchangeability for money. His remittances to them, like those to bankers, might have been appropriated by them directly, without a previous conversion into cash, or discount by them-

selves, for any necessary purpose of their agency for which payments by them in money could have been rightly charged against him in account, if such appropriation could be made without an improper sacrifice of his interests. If a transfer to other persons of his remitted bills before their maturity had been thus made for any such purpose of their agency, the transfer might have been made with a deduction of a discount if not of an unreasonable rate. The value of bullion thus appropriated might be ascertained by weight, at the market rate per ounce, or, it might be delivered at the mint, and the liquidation abide the receipt of the official certificate. At the maturity of his drafts upon them, if they were not in cash to a sufficient amount from his remittances, they might thus have discharged from time to time the amounts falling due, so far as the draft holders might be willing to receive his remitted bills, or his bullion, in payment. So when the cash balance of the defendants' general account with him was in their favor, they might thus appropriate his bullion or his remitted bills, to an amount or value *not exceeding such balance,* to purposes of *their own,*— such, for example, as the payment of their own debts to which he was not privy, and in the discharge of which he was not interested. This was the course adopted by them in the two appropriations of 16th August and 29th August, 1851, in favor of Beebee & Co., and Willis & Co., respectively, both covered by the balance in which his account was then overdrawn. In those instances, however, when the mint certificates had been received, and the respective amounts liquidated and credited to the defendants, they should of course have credited him with equivalent amounts.

But, as between the principal and his agent, the convertibility in such cases of the remittances into money, though they even consist altogether of negotiable securities, does not alone suffice to render the agency that of a banker. In the present case, if, as between the defendants and S. B. Ludlow, the sole regular criterion of the value of his remittances in account had been the prices of intended sales of the bills or bullion, which their duty required them, if possible, to effect, they would have been his

mere *factors*. In Exp. Pauli, 3 Deacon, 169, 174, dealers in bullion and foreign exchange, who were also bill and money agents, were in the habit of receiving from a banker in another country, foreign bills of exchange *for sale*, with instructions as to the mode in which they were to be disposed of, and the proceeds to be applied. They do not appear to have had relations, with him of any other kind. Though they were in the habit of endorsing the bills when sold, and giving him credit for the price, for which he was then at liberty to draw upon them, they were judicially designated as his factors. Ch. Baron Pollock, when at the bar, said, in an argument upon the relation between a banker and his customer, that "a banker is a factor for money." (2 Barnw. & Cr. 425.) If any authorities apparently suported his observation they were cases in which, under special circumstances, the rights or liabilities of a banker had been judicially described as, for certain purposes, *like* those of a factor. *Resemblance*, however, does not here constitute *identity*. This observation in so unqualified a form cannot be safely adopted. But a professional banker's agency may, from the purposes for which he receives a remittance, become that of a factor.

The purpose for which a factor has received a remittance may also render him in a specific relative sense, a banker. (Buck, 364.) But here, again, the agency may strongly *resemble* that of a banker, without becoming one of this character. The danger of confounding the two descriptions of agency may be exemplified in the case of remittances in bills to a factor by a principal whose consignments of merchandise would not suffice to secure his drafts upon the factor. When there is to be *no sale* of such bills on the remitter's account, and they are only to be collected at maturity, or discounted by the deduction of a fixed rate of interest for the time that they have to run, the agency respecting them has a strong external resemblance to a banker's. But his right of retaining their avails in money as a security for his accruing liabilities not as yet matured, is determinable by the same rules which would apply to the proceeds of sales by him of his principal's merchandise. If he was a

simple banker only in respect of such bills, his right of retaining the cash avails for this purpose, would not always be determinable by the same rules.

In the present case the mails to and from California were semi-monthly. The average time of communication, either way, was about five weeks; and the time for the receipt of an answer to a letter, usually, between eleven and twelve weeks. This remoteness of the parties from each other, and unfrequency of their intercourse, the mode in which the remittances in bullion were forwarded by shipments, and certain incidents of their transportation and primary custody on arrival, gave to the defendants' agency an external resemblance to that of the factors of a foreign consignor.

This *resemblance* alone did not suffice to render them in any respect S. B. Ludlow's factors. But, independently of certain evidence in the cause, that they were his *general* agents, a necessary result of some of the above-mentioned incidents of their agency was, that they must have had a discretionary authority to *sell* his bullion, or his remitted bills, in the money market, for his account, whenever such sales would, in their opinion, have been conducive to the promotion of his interests. As they were not legally his brokers, they would, if they had made any such sales, have been his factors as to the subjects of sale. (See 2 Barnw. & Alders. 143, 148; 7 Mann. Gr. & Sc. 693, 694; 3 Deacon, 169, 174.) Therefore, if the defendants were the bankers of S. B. Ludlow, they were his bankers with a power enabling them to act as factors. The existence of such a power to sell, though it may never have been exercised, cannot properly be disregarded in defining the character of their agency. It prevented them from being the *simple* bankers of their principal.

If the avails of his remittances were to have been credited to him, *without any sale* of them to other persons, the defendants would have been simply his *bankers*. A *purchase* by a banker from his customer, of the kind known as a *discount*, is distinguishable, in this respect, from a *sale* to other persons. The *discount* is effected by crediting to the principal a price

ascertained by some stipulated or uniform rate of deduction from a standard value. Bullion may be thus, under certain circumstances, discounted by a credit at a fixed rate of deduction below its nominal value. The banker who credits the amount thus ascertained, in becoming a purchaser of the bullion, ceases to be an agent. (2 H. Bl. 502, 503.) A banker who discounts undue bills or notes received from his customer, by crediting to him their amounts, less interest for the respective times between their maturity and the dates of the credits, becomes, in like manner, as to the paper thus discounted, a purchaser, and ceases to be an agent from these respective dates. (2 Barnw. & Cress. 432, 433; 2 Mylne & Cr. 404.) His *agency,* therefore, can only subsist as to such securities of his customer as have not been discounted. In the present case, there does not appear to have been a discount by the defendants of any security received from S. B. Ludlow.

A commercial agency may be of such a compound character as to render the agent at all times, in some degree, a factor as well as a banker, as to the same subjects of his agency. It may also be of such an alternating character as renders the agent, by turns, a banker or a factor, as to subjects of his agency, otherwise of the same class. (2 H. Bl. 502, 503.) In England, before the recoinage which was effected in the last century, the weight of the current coins of the realm had varied in such degrees that they were dealt in as bullion by goldsmiths, who, like the parties in the present case, were also dealers in exchange. The business of private banking was formerly transacted principally by such goldsmiths. (1 Ld. Ray. 733, 734; 7 Serg. & Raw. 465.) After the recoinage, the light coins were still dealt in, to a greater or less extent, as bullion, by the goldsmiths, until the suspension of specie payments, near the close of the century. (See 5 Durnf. & E. 215, 217 (n); 2 H. Bl. 502, 503; the statutes 13 G. 3, c. 71, and 14 G. 3, c. 70; the acts of the Executive Government in 1773 and 1774, in Ruding's Annals of the Coinage, Lord Liverpool's Letter on the Coins, ed. 1805, pp. 3, 4, 143, 175 to 179; Huskisson on the Currency, A. D. 1810, pp. 25, 26; Eckfeldt and Dubois' Manual,

pp. 34, 35.) In the meantime, however, goldsmiths were gradually confined to their legitimate avocations, and the general business of private banking passed into the hands of other persons, as professional bankers. Before this change in the character of the business, the twofold relation of the goldsmiths to a remitter of bullion and bills, probably, was often that of both factors and bankers.

The present practice of the London bankers, or that which prevailed in the last, and at the commencement of the present, century, was to enter the amounts of discounted bills, after deducting the interest, in the outer column of a customer's account, where his deposits of cash were credited. Their practice as to bills *not discounted* was to *enter them short,* as it was called. This consisted in making a note, in an inner column of the customer's account, of the receipt of such bills, their amounts, and the times when they would be payable. When their amounts were afterwards paid, they were carried forward into the cash column of credits.

The practice of English bankers in other cities and towns, called *country bankers,* differed from that of the *London bankers* as to bills *not* discounted. A portion of this *undiscounted* paper consisted of what were called *approved* bills. When such approved bills, which had not a long time to run, were brought by a customer to the country bankers, they were in the habit of entering them to his credit at once, in the column in which cash received from him was credited, and paying him their amounts, or letting them draw for them as cash. No *deduction* of interest in the form of a discount was made as these credits were thus entered. But interest was charged on both sides of the account, including these transactions; and when the balance of interest was against the customer, the bankers charged a commission. These running bills were *always endorsed* by the customer. The country bankers, as it suited their convenience, paid them away to their customers, or transmitted them to their own correspondents in London. (9 East. 12; 2 Barn. & Cress. 422; 1 Rose, 232 to 257.) Decisions hereafter cited have established the law in England, that such

running bills did not become, like discounted bills, the property of the country bankers; but, like the bills entered short by London bankers, continued to be the property of the customer. Thus, the bills *entered short,* and the undiscounted bills *carried out* in the cash column of credits, were the subjects alike of a continuing *agency* on the part of the bankers.

A simpler mode of conducting the business of bankers, as to undiscounted securities, is, to omit crediting them to the customers until the actual receipt of the avails in cash or its equivalent. The accounts of the defendants with S. B. Ludlow indicate that they adopted this course in the transaction of the business in question. The full amounts of the bills which he remitted, as collected at their maturities, were credited. The product in coin of his remittances in bullion was always represented by credits for the mint certificates when received.

We have seen that if the defendants' advances and intended acceptances had been properly secured by S. B. Ludlow's remittances, they were to have transacted his business without any charge for compensation. This arrangement may perhaps be referable to the consideration of their consanguinity, or that of their former connection in business. But, the course of their business, in this respect, whatever may have been the motive, resembled that between a banker and his customer. It is true that the transaction of banking business for a distant customer is very often attended with a charge of a commission upon acceptances, or upon advances. (See 15 Ves. 120; 17 Ves. 332; 1 Rose, 238; 1 Madd. 112; 3 Durnf. & E. 52 (c); 1 Bos. & Pul. 144; 9 East. 13; 3 Campb. 491, 492; 16 Johns. 375.) But the charge is not as universal as it is in the case of a factor. The practice of some bankers is to charge a customer with a commission on such sum only as the balance of their interest account against him shows, by computation, to have been the average amount of their cash advances. (9 East. 13.) This appears to have been the rule adopted by the defendants in making the above mentioned charge of commission at the close of their general account.*

* Ante, pp. 86, 87.

If the character of the defendants' agency had been determinable by the mode in which its business was uniformly conducted, from the commencement of 1851 to their failure, they would, therefore, have been simply S. B. Ludlow's bankers. Had the distance between the parties been less great than it was, and their intercourse less restricted, their agency as to his remittances might, therefore, have been denominated that of simple bankers. If they were, in any degree, his factors, it was because the exigencies of their agency required that a discretionary authority to sell should be one of its incidents. It has been stated that this power, if it existed, was never exercised.

The first proposition will, therefore, be considered as the question would be presented if the defendants had been simple bankers of S. B. Ludlow, and also as it would be presented if they were his mere factors.

When a banker who has in hand a security belonging to his customer credits him with an amount collected from it, the case is, in effect, the same, as to the amount credited, as when the banker credits an amount originally received from the customer in money. In the latter case, the sum credited is popularly called a deposit. But this is legally a misnomer. The amount credited becomes at once, in either case, the banker's, though the course of his business may be to allow no interest. The credit, in either case, represents merely an amount for which the party credited may draw upon the bankers. In 3 Meriv. 568, 569, Sir W. Grant, who had previously decided the point, (ib. 541, (n)) said: "There is a fallacy in likening the dealings of a banker to the case of a deposit, to which, in legal effect, they have no sort of resemblance. Money paid into a banker's becomes immediately a part of his general assets; and he is merely a debtor for the amount." Sir W. Grant added that the money ceases to belong to the party paying it "the moment he has parted with it, and he has only to trust, for the return of it, to the solvency of the persons into whose hands it passes." Lord Langdale used similar language in Watts *v.* Christie, 13 Jurist, 845, 846; (S. C. 11 Beavan, 551-2,) and

the case of Jackson *v.* Bank United States, 10 Barr, 61, was decided under a similar view of the subject: See also Sims *v.* Bond, 5 Barnw. & Adolph. 392, and Lloyd *v.* The West Branch Bank, 3 Harris, 175.

Between a factor and his principal who does not receive interest upon the credits from their date, the case is ordinarily different. The factor, in such a case, cannot justify mixing proceeds of sales of the principal's consignments with his own funds, or otherwise using them for his own purposes, without proof of an understanding express, or implied, with his principal, that the relation between them shall, in this respect, resemble that of a customer with his banker. But, when the consignor who, from time to time, draws upon his factor, has, without objection, received accounts in which the factor has, in all cases, allowed him interest on such credits, from their dates, the right of the factor to use the proceeds thus credited, as his own, is unquestionable.

In the present case, the correspondence and accounts prove, and the answer, in effect, states, that the defendants had not been at liberty to dispose of his remittances without passing the avails to his credit in the same general account in which they charged the payment of his drafts. Thus, the avails of the remittances, as far as they sufficed, would always, after the repayment of the defendants' charges and advances have been applicable to the payment of his drafts negotiated under their letter of credit. As this letter of credit obliged the defendants, as between themselves and the draft holders, to honor the drafts, whether in funds for the purpose or not, the reciprocal right of using, in their own business, occasional cash balances to his credit on which they allowed him interest, would not have been unreasonable.

As the defendants' accounts with him were stated, and balanced, at three successive rests, in the year 1851, interest was allowed him on every credit from its date, while interest was charged on the other side from the date of each payment. The balance of interest, at each rest, was added to the balance of principal, so as to form part of the principal in the new account.

By acquiescence, and otherwise, S. B. Ludlow admitted the correctness of these accounts. This mode of accounting, as to interest, is not unusual between a banker and his customer, or between a factor and a consignor who draws against his consignments, or otherwise obtains regular, or occasional advances. (Baldw. 536; 2 Anstr. 495; 9 East, 13; 2 Barnw. & Cress. 422; 19 Ves. 26, 39, 41; 1 Rose, 239; 17 Barbour, 385; 1 Ball & B. 421.) In the present case, no credit turned the balance of the account at any time, in S. B. Ludlow's favor. The account of interest, therefore, was, in effect, less that of agents with a principal than of creditors with a debtor. The accounts, for this reason, are not quite as decisive as they might otherwise have been, of the defendants' right to use, as their own, the amount of any such balance as might have, afterwards, at any time, appeared to his credit. But, their caption, "S. B. Ludlow & Co., in account current with Ludlow & Co., *and interest six per cent. to" the respective dates at foot,* and their general similarity to those of private bankers, leave no room for any reasonable doubt that if the balance had ever been in his favor, he would still have received interest on each credit from its date. If so, the mutual understanding, like that which always exists between a banker and his customer, and frequently between a factor and his consignor, must have been that they had, until the suspension of their payments, the right of using, in their own business, occasional cash balances appearing on their books to his credit.

The right of a banker, while he honors his customer's drafts or checks, thus to use, in his own business, the funds which he duly credits to the customer, is usually attended with a right on the part of the customer to draw out at pleasure the occasional balances to his credit in the banker's account, though, in so doing, he leaves liabilities under outstanding engagements to the banker unsecured. (See Beckwith *v.* Union Bank, 4 Sandf. 604.) Brandao *v.* Barnett, in the House of Lords (3 Mann. Gr. & Sc. 531, 532, 535,) recognizes the doctrine of previous decisions that a banker has a general lien upon all *securities* in his hands belonging to his customers received in the regular

course of his business. But, in a subsequent case, already cited, in which there had been an "argument that bankers had a lien on *balances* in their hands," Lord Langdale said that "there was no authority for it"; and added that "customers were entitled to have their balance paid immediately upon their order for it, otherwise a business of this sort could not be carried on." (Watts *v.* Christie, 13 Jurist, 846, S. C.; 11 Beavan, 555.) According to the dicta of Lord Ellenborough in Madden *v.* Kempster, (1 Campb. 13,) and of Lord Eldon in Exp. Metcalfe, (11 Ves. 408,) the tendency of Sir James Eyre's language in Hollingsworth *v.* Tooke, (2 H. Bl. 502, 504,) and the decision of the Court of Bankruptcy in Exp. Pauli, (3 Deacon, 169,) the rule stated by Lord Langdale must be confined in its application to *simple* banking business, and is inapplicable to cases in which a banker's functions are analogous, in any degree, to those of a factor. Even where the course of business, in such cases, authorizes the use by the factor, like a banker, in his own business, of the amount of any cash balance in his hands, his lien extends to such a balance. In the present case, however, the defendants were secured, not under a mere *lien*, but, as has been shown, under an *appropriation* of the remittances. If they were simple bankers of S. B. Ludlow, the credits for the proceeds and avails, though not covered by their *lien*, were not less included in the *appropriation* for their security than if the amounts credited had been money then lodged with the defendants *for that purpose*. (See Morse *v.* Williams, 3 Campb. 418.) A *balance* of cash in their hands would, as the product and ultimate substitute of the remittances, have represented them for this purpose. In Beckwith *v.* Union Bank, (4 Sandf. 604, 610,) a bank charged a customer's account with a dishonored bill of which he was endorser. He had, before its maturity, made a general assignment for the benefit of his creditors, of which, however, the bank was ignorant when the bill was thus charged. His assignees recovered from the bank the cash balance to his credit at the date of his assignment without any deduction on account of the bill. The reason of the decision was that the bank had not, in respect of the bill, any

lien upon this balance. But, the Court said that the bank, if it had *made advances, or incurred liabilities for him in respect of the sum of his credit,* would have been protected against the assignees.

The cash balance of the defendants' account never was in favor of S. B. Ludlow; and, had it been, he was not at hand to draw its occasional amount, and had at hand no agent authorized to draw it out. Nevertheless, the point was one of great practical importance. The defendants might after their failure have been made garnishees in foreign attachments prosecuted against S. B. Ludlow in Pennsylvania. As their payments of his drafts had ceased, cash balances of their account would from time to time have been accruing to his credit. The attachments might have intercepted such prospective cash balances unless they were included, as we have seen that they were, in the general appropriation for the security of the defendants' accruing liabilities.

Thus, if the defendants had been in debt on cash account to S. B. Ludlow, but under accruing liabilities for him, he could not, without exonerating them from such liabilities, have taken the balance of cash out of their hands; but they could use its amount *as their own* until their liabilities became payable.

The second proposition* depends upon the question whether the defendants would have been justifiable in using the amount of such a balance *as their own* after they had ceased to honor his drafts. The question must be answered negatively. The *punctuality* with which the drafts were to be honored by the defendants was the sole foundation of their original right of using the avails of the remittances as their own. The right ceased when they ceased to honor the drafts. (See McCrelish *v.* Churchman, 4 Rawle, 26, 37, 38.) Though the dishonor of the drafts was caused by no fault of their own, but by his failure to make adequate remittances for their security, the right was then terminated. They could still *retain* the *specific* proceeds

* See this proposition stated, p. 107.

for their own security, keeping them apart from their own funds. But their duty then required them, as his agents, to apply the *specific* surplus, remaining after payment of the balance due to themselves, to the discharge of his drafts negotiated under their letter of credit. Their former exemption from this duty ceased when they no longer applied *other* funds to this purpose. The duty was not less binding upon them because they had coincident rights and co-extensive interests of their own. Exp. Waring, 19 Ves. 350, and many of the cases above quoted as having been determined upon the authority of that decision* are adjudications in point.

A broken bank holding undue notes deposited by a customer for collection, will, therefore, be restrained by a court of equity from using in its own embarrassed business the proceeds of its collections which it might have thus used if it had continued the regular payment of his checks. If, under a credit opened by the bank, before its failure, in favor of the customer, his account has been overdrawn, and the notes have been deposited in order to secure the balance to his debt, the broken bank will be restrained from using as its own the surplus of the proceeds *above* such balance. If the bank is, moreover, under the credit, involved in liabilities for his drafts which are outstanding, an injunction would nevertheless be granted prohibiting the application of the surplus to any purpose other than the payment of such drafts. Therefore, if the present bill had been at the suit of S. B. Ludlow containing an averment that the defendants were insolvent and did not *intend* to apply the surplus proceeds of his remittances remaining after the payment of the balance due to themselves,—or to apply any other funds which were at their command,—to the payment of the drafts in question, an injunction would, in like manner, be awarded, if the averment appeared by their answer or otherwise to be true.

If, under such a proceeding at the suit of S. B. Ludlow, it appeared that the defendants intending to dishonor his drafts,

* See the cases ante, p. 72.

intended also to apply the amount of such surplus, when collected, in payment of other debts of their own in the discharge of which he was not interested, the court would not hesitate a moment in ordering the funds into court, or placing them in custody of a receiver. To refuse to extend its protective interposition for the purpose would be to sanction a fraud. A banker who credits the proceeds of securities in his hands *intending,* at the time of doing so, to use them as his own, but *not* pay the checks or drafts of his customer, is guilty of a fraudulent abstraction of the funds in crediting and using them with such an intent. Persons not privy to the fraud may indeed be able to retain the funds thus abstracted and misapplied by him which they have innocently received. But, the party defrauded can recover their amount or value from receivers of them who colluded with him, or were privy to his guilt. The circumstance that, in the absence of such a guilty intention, he might have used the funds as his own, would not enable him or participants in his fraud, to avoid its consequences. A seller of goods on credit, after their delivery has been so completed that the right of stoppage in transitu is ended, cannot, on account of the buyer's insolvency, resume the possession of them unless he can prove that they were bought with a preconceived intention of not paying the price. But if he can prove that they were thus fraudulently bought, he can retake them from the possession of the buyer, or of any party privy to the fraud, or may recover their value from a party thus privy who has converted them to his own use. (See 9 Barnw. & Cress. 60; 1 Barnw. & Cress. 514; 7 Bingh. 543, 552, 553; 3 Taunton, 274; 2 Brod. & Bingh. 371; 2 Marshall, 370; 7 Taunton, 59; 3 Wharton, 396, 397; 4 Whart. 500, 506; 2 Mason, 238 to 240; 3 Johns. 235.)* Proof of the buyer's

* Some decisions in New York have, since the case in 3 Johnson, apparently sanctioned the application of this doctrine in cases where the proof of the fraud would, elsewhere, not be thought sufficient. The recent criticism on these later New York decisions by Woodward, J., in 7 Casey, 326, 327, interpreted with reference to the question of *evidence,* does not impugn the general doctrine which had been established in

irretrievable insolvency, and of his knowledge of it, accompanied by evidence that the goods were not used in any regular course of legitimate business, but were at once passed over to a particularly favored creditor, or thrown at once into the wreck of the insolvency, suffices, in such a case, to prove the fraud. Evidence that the buyer, when he purchased, knew himself to be insolvent, will not, alone, suffice to prove such a preconceived intent not to pay the price. The reason that, in this case of a purchase on credit, mere knowledge of insolvency does not alone prove the fraud, is two-fold. The buyer, though insolvent, may be engaged in a profitable business, carried on with a hope of paying his former debts, or with an expectation of meeting, at all events, his new engagements. He, moreover, acquires, in the goods bought, a new capital, so to speak, for the term of the credit. He may, before its expiration, have sold them, worked them up, or otherwise turned them to account, so as to be able to pay the price at the end of the time. A presumption of innocence cannot, for like reasons, apply in favor of an insolvent banker or factor, who applies to his own use the proceeds of his principal's property, particularly of that received by him after the suspension of his payments. A banker who, knowing himself to be insolvent, and unable to continue to honor his customers' drafts or checks as presented, uses their funds in the payment of his own debts, voluntarily deprives himself of the only means through which he can reasonably expect to be able to fulfill the duties of his agency, or sincerely intend so to do. He cannot pretend that he thus used their funds with an intention to honor their checks or drafts with punctuality. In the absence of such an intention, this use of their funds is a malappropriation without a legal or a moral excuse.

The defendants appear to have known that if they applied the proceeds of S. B. Ludlow's remittances, which arrived after their failure, to any purposes other than those of their agency,

Pennsylvania as well as in England by the decisions mentioned in the text.

they would not have at their command any means of restoring the amounts thus used, or of applying moneys derivable from other sources to its purposes. That they had, in fact, no other means at their command available for such purposes is fully proved. If they did not know this to be the case on the 25th of August, 1851, when they ceased to honor his drafts, they certainly were convinced of it before the arrival, some days afterwards, of the first of these remittances. They therefore could not, without a breach of good faith, have applied their proceeds to any different purpose.

The resolution of the third proposition* is arrived at in the simplest mode through an ascertainment of the *right of ownership* which continued to subsist in S. B. Ludlow, the *remitter* and *principal.*

So long as the defendants' advances were unpaid, and they were not exonerated from their liabilities on his account, he could not, against their will, even by revoking their agency, have divested their qualified interest in his remittances, or in the proceeds or avails required for their intended security. But subject only to such right or interest as was vested in them for this purpose, the ownership of the remittances was in himself alone.† His right of revoking their agency was limited only by this right or interest, and by such incidental privileges as were necessary for effectuating their security. This right of revocation, so far as it could be exercised without depriving them of such security, was exercisable by him notwithstanding their lien, and notwithstanding their interest under the appropriation. Had he, at any time, paid or tendered to the defendants the amount of their general balance and outstanding charges, and taken up his drafts upon them, and exonerated them from their liabilities under the letter of credit, his right of revocation of their agency would have become absolute and unlimited. He could, in that case, by exercising this right,

* This proposition is stated on p. 107.

† See ante, pp. 12, 13.

have taken his remittances, if undisposed of, out of the defendants' possession into his own. The principal, where third persons have acquired no valid interest, may not only thus resume possession of the subject of an agency in the original form of such subject, but may also take possession of all securities or investments which are its product or substitute in the hands of the agent, and may follow its proceeds after its rightful or its wrongful conversion into money, so long as the funds can be traced and identified. When an English banker, who is under outstanding acceptances for a customer, and has in hand negotiable securities belonging to the customer, becomes bankrupt, the Court of Bankruptcy will make an order for the restoration of the securities to the customer on his giving approved security to indemnify the bankrupt and his estate against the outstanding liabilities. (2 Rose, 162; 1 Rose, 280.) In this, as in other cases of trust or authority, the existence of the agency has prevented the subjects of it from passing, under the English bankrupt acts, as effects in the reputed ownership, or at the order and disposition, of the bankrupt. That the principal may, at pleasure, exercise the right of thus revoking the agency and resuming possession of the remittances, when the agent is a factor, appears from numerous cases. (2 Ves. Sen. 582; 1 Atk. 232; 1 Younge & Jerv. 216; 5 Clarke & Fin. 522, 523; 11 Howard, 224, 225; 1 Deacon, 681; 3 Deacon, 169; Walsh's case, 4 Taunton, 268, also 3 Maule & Selw. 574, 575, where other cases in point are cited.) The exercise of the right has also been sustained where the agent was a banker, whose relation to a portion of his principal's remittances, consisting of bullion and endorsed bills, was, in a special and limited sense, that of a factor. (Hollingsworth *v.* Tooke, in the Exchequer Chamber, 2 H. Bl. 501; see 1 Bos. & Pul. 549; 1 Rose, 241.) A like decision had previously been made, where the agent was a London banker, and the securities of which the value was recovered by the customer were bills endorsed by him, which had been received by the banker and *credited short.* (Zinck. *v.* Walker, 2 W., B. C. 1154.) In both cases, the resumption of possession at the time

of the respective bankruptcies was impossible, as the bankrupt was then, in each case, under acceptances for the principal to an amount greater than the value of the securities. But the principal, having afterwards in each case taken up the drafts, recovered the value of the securities from the bankrupt's assignees.

In Giles *v.* Perkins, (9 East. 12,) the principle on which these decisions depend was applied where the securities were bills to the credit of a customer with his country banker, *not entered short, but credited before maturity in the cash column,* without the deduction of a discount. According to the course of business above explained,* the customer might have drawn for their amounts before their maturity. The bankers, before their maturity, became bankrupt. Their assignees refused to return the bills to the customer; and, as they fell due, received the amounts from the acceptors. In an action by the customer against the assignees, the question was, whether the bills ought to have been returned to him, or he was only entitled to prove their amounts, as a creditor, under the commission, for his dividend. He recovered their whole amount from the assignees, Lord Ellenborough saying that "every man who pays bills not then due into the hands of his banker places them there as in the hands of his agent, to obtain payment of them when due. If the banker discount the bill, or advance money upon the credit of it, that alters the case. He then acquires the entire property in it, or has a lien on it, pro tanto, for his advance." The obvious meaning of this was, that the agent, when he *discounts* the bill, acquires the entire or *absolute* property; but when he makes an *advance,* acquires only a lien, or *qualified* property in the bill.

When a man parts with possession of a bill which he has *endorsed,* the presumption, in general, is, that he intends to transfer it absolutely, and to be liable, as endorser, to whomsoever may be the holder. The question has been, whether, when the party to whom he transmits it is his agent, and does *not*

* Ante, p. 113.

discount it, this presumption is rebutted, as between the agent and himself, by the mere fact of agency. The case of Giles *v.* Perkins was an authority that the presumption is thus rebutted when the agency is of such a character that, as in the case of a banker, the endorsement may facilitate the transmission of the bill, or its collection from parties primarily liable. The decision was, in effect, that all undue or unpaid bills, *endorsed* by a customer, and received from him by his banker, continue, while in the banker's hands, to be the customer's property, unless they are discounted by the banker. It negatived the distinction, in this respect, as to bills credited before maturity, between a bill entered short and one entered in the cash column, without the deduction of a discount.

This case of Giles *v.* Perkins, decided in the year 1807, was not easily reconcilable with Bent *v.* Puller, (5 Durnf. & E. 494,) decided in 1794. Lord Cranworth, when Solicitor General, referring, as counsel, in argument, to Bent *v.* Puller, said that it had been determined before the law on the subject had been much considered or well settled, and that its authority was extremely doubtful. (2 Mylne & Cr. 402.) But Lord Eldon, for many years after the decision of Giles *v.* Perkins, hesitated in rejecting the authority of Bent *v.* Puller; and, in one case, at least, (Exp. Sargeant, 1 Rose, 154,) his reasoning is, with difficulty, reconcilable with Giles *v.* Perkins. In several cases he directed an inquiry whether the endorsement was intended to enable the agent to proceed upon the bill against all parties whose names were upon it, including the customer himself, or was intended *merely* to facilitate its transmission, or the enforcement of remedies upon it against parties other than the customer. The banker, he thought, would acquire, in the latter case, only a *qualified,* but in the former an *absolute,* property in the bill. (See Exp. Toogood, 19 Ves. 231, 232; Exp. Sargeant, above cited, and the cases under Boldero's Bankruptcy, 19 Ves. 25 to 61; 1 Rose, 232 to 257.)

The doubt in England upon the subject was resolved in Thompson *v.* Giles, (2 Barnw. & Cress. 422,) decided in 1824.

In this case, all approved bills received by a country bank from its customer, "whether made specially payable to the customer or not, were endorsed by him, or if, for any private reasons, he did not wish his name to appear on the bills, a letter was given to the bank, acknowledging himself to be equally liable as if he had endorsed." It was decided that a credit of such bills by the bank, in the cash column of the customer's account, if an entry of them *as cash,* "was not, of itself, sufficient to convert the property." There was a local custom of bankers to *use* the bills received from their customers. But this, the court thought, did not mean "that they so used them, *as their own,* without reference to the customer's account." The case was, in principle, the same as Giles *v.* Perkins. It was decided to be within "a general rule," which Holroyd, J., stated to be, "that if a customer pay bills into a banker's hands, although it gives him a right to expect that his drafts will be honored to the amount of the bills paid in, yet *the property in the bills is not altered; they still remain the property of the customer,* though the banker may have a lien to the extent of his advances."

The subsequent case of Exp. Thompson, (1 Mont. & Mac. 102,) decided by Vice Chancellor Shadwell, according to the tendency of Lord Eldon's reasoning in Exp. Sargeant, was, afterwards, upon the authority of Giles *v.* Thompson, overruled by Lord Brougham in Exp. Benson, (1 Mont. & Bligh, 120). Giles *v.* Thompson had, in the meantime, been approved and followed by Lord Lyndhurst, in Exp. Armistead, (2 Glyn. & Jam. 379, 380). In language afterwards used by Lord Cottenham, the law on the subject is, "that, unless there be a contract to the contrary, if a person, having an agent elsewhere, remits to him, for a particular purpose, bills not due, and that purpose is not answered, and then the agent carries them to account, and becomes a bankrupt, *the property in the bills is not altered, but remains in the party making the remittance.* That, of course, may be regulated by usage; but, prima facie, without special contract, the presumption is that the bills are received by the agent for the purpose of in-

demnifying him against any eventual loss, and are not to be dealt with as his own," etc.

The case in which Lord Cottenham used this language was that of Jombart *v.* Woollett, (2 Mylne & Cr. 389, 402,) where the bills had been remitted by a foreign merchant to his London agent, to keep him in cash to meet his acceptances for the remitter when due. The correspondence showed that they were, *so soon as received* by the agent, to be passed to the remitter's credit. But, as the correspondence was interpreted, the credits were to be for their whole respective amounts, without a *deduction* of the discount. It was therefore held that they continued to be the property of the remitter, to whom, on the bankruptcy of the agent, those which then remained in his hands were restored.

The present case is free from even such former doubts as the decisions above reviewed have resolved. The bills remitted by S. B. Ludlow to the defendants were not credited by them until they had collected the amounts in money; nor was the value of his remitted bullion credited until the mint certificates were in their hands. It is, therefore, quite clear that until the respective amounts were thus duly credited, the resulting ownership of both bullion and bills, and of their avails, including the mint certificates, was in S. B. Ludlow, notwithstanding the defendants' lien, and notwithstanding the qualified interest vested in them, for their security under the appropriation of which the character and effect, *as between him and them,* have been defined. The remitted bills were not credited until, by their payment, they became extinct securities. But, the mint certificates, when credited, were not thus extinct. If, after they were credited, they remained in the defendants' hands, and no right of any third person had intervened, S. B. Ludlow might, perhaps, have reclaimed them as his own, exonerating the defendants from all their outstanding liabilities on his account. But, the decision of this precise point is not necessary.

Until the remittances were finally converted into cash, or its

equivalent, and the avails were actually *credited,* the defendants therefore, even while they continued punctually to honor his drafts, with an intention of continuing so to do, had no right or interest of their own in the subjects of their agency, except the right of lien vested in them as agents, and their qualified interest under the original appropriation for their security. As between themselves and S. B. Ludlow they were, consequently, not at liberty to use his bills, or bullion, or the mint certificates, or any other product of, or substitute for his remittances, to an amount or value *exceeding* that of the balance at any time due to themselves, for any purpose of *their own* in which he was *not interested,* or for any other purpose *foreign to duties of their agency.*

Returning from the consideration of the three propositions assumed, as above, by counsel in argument,* we may repeat that the defendants were incapable of delegating their agency to William Taylor, or vesting in him a trust such as was declared in the paper of 1st September, 1851. This paper was, therefore, invalid as an *assignment* for the purpose thus declared, until S. B. Ludlow's ratification of it, which did not occur until after the bill in this case was filed.

But, the defendants had, as we have also seen, a qualified *interest of their own* in his remittances, which was co-extensive and coincident with the purposes expressed in this paper. They were capable, as to this interest, *of declaring a trust,* which, so far as the interest extended, would attach to the ultimate proceeds or avails of the remittances. Whether S. B. Ludlow had confirmed the paper or not, it was, from its date, effectual against the defendants, as their *declaration of such a trust* as to their interest in the proceeds or avails. A court of equity would give to it this effect from its date, though it might, until confirmed, be incapable of taking effect as an *assignment.*

An act purporting to be a present transfer, by a party who

* See ante, p. 107.

has no present right of making it, operates against him as a declaration of trust, attaching to any modified interest in the subject of it, or to any substitute for, or product of, such subject, which may be so vested in him at the date of the act, or so acquired by him after its date, that its purpose can, in whole or in part, be substantially executed without an infraction of other person's rights. To this rule there is a single exception only. This exception is where such an act is entirely without consideration, and has not, so far as the party himself is concerned, been completely executed. When it is thus *both unexecuted by him and voluntary,* courts of equity do not lend their aid in order to give to it a compulsory effect. In every other case they recognize the existence of a trust, and carry it into effect.

In particular cases the preceding act will take effect, even *at law,* so as to vest the new or modified interest. The doctrine under which the preceding act thus takes effect in certain cases, as to real estate, through the implication of a leading use, originated in equity. Cases under this particular head would not now be cognizable at law without the aid of the statute of uses. Independently, however, of this or of any other statute, the doctrine of estoppel has, in some cases, been extended *at law* upon equitable principles with a like result as to both real and personal estate. But, in general, as to both personal and real property, effect cannot be given at law to a preceding act purporting to be a conveyance or transfer which was inoperative when made, without some *new* act of the party by whom it was made. In equity the general rule is different. When there has been a *sufficient consideration* to support the original act, it is *always* recognized in courts of equity as the declaration of a trust. It is afterwards carried into effect under the universal doctrine of such courts, that a trust, so far as it can be executed, shall not fail for want of a trustee.

In the present case, the draft holders, without some such aid as a paper like that of 1st September, 1851, would afford, could not, for want of original privity, have asserted a cog-

nizable interest in the remittances, or in their proceeds. But, their derivative interest, acquired through this paper, in the proceeds or avails which it appropriated for their ultimate security, was cognizable in a court of equity.

William Taylor, named in it as assignee, was a clerk in the employment of the defendants. His acts under it were probably performed in implicit subordination to their direction. For twelve days at least after its date, he, and the defendants, appear to have acted upon it as in force. During this period, William Taylor paid the above-mentioned collection of $1,500 in coined gold. But this gold may have been coined from bullion received before their failure, of which an amount sufficient, or nearly sufficient, was, as we have seen, on hand. Whether the payment was made under the provision in the paper that he should take possession of gold dust shipped by S. B. Ludlow to their care for other parties is, therefore, uncertain. But, on and after the first arrival, after the defendants' failure, of a mail from California, acts of an unequivocal character on the part of both William Taylor and the defendants were performed under other provisions of the paper.

The steamer which brought this mail arrived at New York on the 5th, and her letters reached Philadelphia on the 6th of September, 1851. The remittance by her from S. B. Ludlow to the defendants was of the value of $27,303.50, composed, as has been stated, of $12,000 in bills and $15,303.50 in bullion. Of the bills, two for, together, $6,000, were drawn by Tallant & Wilde on Hoge & Co., of New York, payable at —— days' sight, and two for, together, $6,000, by Burgoyne & Co. on Beebee & Co., payable at five days' sight. The bills on Hoge & Co., endorsed, as usual, to the defendants, were endorsed by them and delivered to William Taylor, who, on the 6th September, 1851, enclosed them to correspondents of his own at New York, that they might be presented for acceptance. They were accepted, and were afterwards returned to him and handed to the defendants. The bills on Beebee & Co., also endorsed to the defendants, were in two parts. The first were

enclosed by S. B. Ludlow to the drawees, in a letter describing them, and adding, "which please accept and *send to Messrs. Ludlow & Co.*, Philadelphia. If not accepted, please protest and *send to same parties.*" The seconds of these bills he sent directly to the defendants themselves, who seem to have awaited the receipt of the firsts from Beebee & Co., with their acceptances upon them. The bullion was in two boxes, and was accompanied by a letter from S. B. Ludlow to Bebee & Co., containing the usual order to forward it to the defendants at Philadelphia. There was also the usual letter of advice from him to the defendants, informing them that it was sent *to them.*

The mint certificate for the delayed remittance by the Union had in the meantime been received. After the deduction from the remittances which arrived on the 5th of September, of a sum sufficient, with the amount of this certificate, to pay the balance of $21,622.67 to the credit of the defendants in general account, there should have been about $19,000 remaining from this remittance to be applied to the payment of S. B. Ludlow's drafts upon them, according to the provisions of the paper of 1st September, 1851.

That the defendants intended and expected to make this application of the avails of the remittance, appears from the following communication, which on the day of the arrival of their letters from California by this mail, they addressed to the complainants, Winter, Latimer & Co.:

"PHILADELPHIA, Sept. 6, 1851.

"MESSRS. WINTER, LATIMER & Co.,

"Baltimore, Md.

"Gs.—You will please take notice that we have made an assignment of all remittances that may be received from S. Beebee Ludlow & Co., of San Francisco, California, for the payment, first, of the balance of their indebtedness to us, and second, of our acceptances of their drafts, and for such sight and time drafts as they may have drawn on us, to be divided pro rata. "Yours, sincerely,

"LUDLOW & CO."

But whatever may have been intended or expected at this date, *no portion* of the avails of this, or of any subsequent remittance, *was ever applied for the benefit of the draft holders.*

Some of the remittances were levied upon, it has been alleged, at New York and elsewhere, under foreign attachments against S. B. Ludlow, at the suit of holders of his dishonored drafts upon the defendants. Portions of the bullion would seem to have been temporarily attached, but not to have been detained under the attachments. Other portions are said to have been attached and never to have been restored. The *character* of the proceedings by way of attachment, however, has not, nor has even their *occurrence,* been properly proved. Draft holders who instituted such proceedings have, of course, precluded themselves from holding the defendants accountable in respect of the funds attached and detained. Whether the defendants are accountable to *other* draft holders for not having reclaimed remittances thus attached, is a question which will not require particular consideration, unless these other draft holders ask a reference in order that the subject may be investigated. But no plaintiff in any such attachment will be permitted to participate in the benefit of any distribution under a decree in the cause without accounting for the amount attached and detained at this suit, as an addition to the fund for distribution.

The invoiced value of such portions of the bullion as are alleged to have been attached and detained was not, in the whole, more than about $10,692.44, which was, as we have seen, less than the amount in which the entire value of all the remittances fell short of the aggregate amount of his drafts. The attached portions of the remittances, therefore, will probably not be taken into account in future stages of the cause, except so far as may be necessary for the adjustment of equities among the draft holders in the distribution of amounts *not* attached. The amounts of the ultimate avails of the remittances *not* attached are known with exact precision, as will hereafter appear.

The narrative of the occurrences through which the security intended for the benefit of the draft holders was frustrated as to these amounts, must be preceded by some account of the relations between the defendants and their former partners, who composed the New York house of Beebee & Co.

The Messrs. Beebee had been the capitalists of the former houses at New York and Philadelphia. Mr. Ludlow, at the dissolution, was largely indebted to them, principally from having, with partnership moneys, paid his own losses in private speculations, and from having applied such moneys in payment of the above-mentioned private losses of S. B. Ludlow, and of similar losses of R. McKinney Ludlow, and also of another clerk of the former Philadelphia house. This clerk, and R. McKinney Ludlow, united with him in a joint and several note for the whole debt, payable in 12 months from 1st January, 1851, with interest. A payment on account was made by this clerk soon after its date, and Mr. Ludlow was not long afterwards credited upon the note with his share of profits of the former New York house, leaving due upon it about $88,000. In the following year, $90,000 was received on account of it from securities which had, from its date, been in the hands or control of Messrs. Beebee. In consequence of interest accrued in the meantime, a small amount appears to have remained unpaid, whether secured or not, the evidence does not show distinctly.

Beebee & Co., at New York, and the defendants, Ludlow & Co., in Philadelphia, appear to have been agents of each other in these respective cities. The failure of the defendants does not appear to have affected the standing or credit of Beebee & Co., who, for a long time afterwards, continued their business upon its former footing. In the course of the new business of the year 1851, between these houses, a debt appears to have been incurred by the defendants to Beebee & Co. Some of the proper materials for the ascertainment of its true magnitude at the time of the defendants' failure have not been exhibited. If its amount were a point of importance in the cause, as, however,

it is not, the testimony as to the alleged amount would require a closer scrutiny than could be made without a special reference to a master. That a debt of considerable amount existed, there can be no reasonable doubt. Its amount, after the proceeds of the bullion by the Union had been credited, may, for the purposes of the present investigation, be assumed to have been as great as the value of all the remittances of S. B. Ludlow, which arrived after the defendants' failure.

The mode in which Beebee & Co. facilitated the transmission of bullion from S. B. Ludlow to the defendants, by insuring, or engaging to insure, this portion of his remittances, has been sufficiently described. The necessity for a receiving and forwarding agency at New York has also been explained. The legal and equitable relations between S. B. Ludlow and the defendants were, in all respects, the same as if no such middlemen as Beebee & Co. had intervened. Beebee & Co. seem to have always avoided, and, indeed, to have expressly disclaimed, all other connection with S. B. Ludlow than that of simple receiving and forwarding agents. Some loose testimony that he was their agent at San Francisco is entirely contradicted by depositions and letters of which the effect cannot be mistaken. They had other correspondents in California, with whom they transacted there an extensive business in which he was not a participant. If he, and they, sometimes, executed reciprocally, small commissions for each other, the occasional transaction of such business was not connected with any subject of consideration in the cause.

On 6th September, 1851, the day on which the defendants wrote their above-mentioned letter to Winter, Latimer & Co., Beebee & Co. wrote, from New York, a letter to the defendants, which is one of those that the defendants have suppressed. It is, moreover, not in the letter book of Beebee & Co., as one of the members of that firm deposes. It was, doubtless, therefore, intended as a communication out of the regular course of business. From the subsequent correspondence, we may infer that it requested the defendants to send to Beebee & Co. such an order for the bullion just arrived as they had pre-

viously received from the defendants for the shipment by the Union. This letter seems to have excited the defendants' fears lest Beebee & Co. should keep the firsts of the two bills of exchange on themselves which composed a part of the remittance just arrived, and credit the amounts to the defendants on account of their debt, instead of accepting these bills and sending them to the defendants for the business of their agency. Perhaps the letter of Beebee & Co. may have intimated that they had such a purpose. On Monday, 8th September, the seconds of these two bills, endorsed by the defendants "to the order of Wm. Taylor, *assignee,*" and by William Taylor describing himself as *assignee,* were enclosed by him in a letter to the same correspondents at New York, to whom he had already sent the bills on Hoge & Co. He deposes that the bills were handed to him "by Ludlow & Co., *under the paper of 1st September, 1851.*" His letter of 8th September instructed his correspondents to present the bills on Beebee & Co. for acceptance, and, if they should not be accepted, to have them protested, and return them. On the next day, the defendants answered Beebee & Co.'s letter of the 6th, as follows:

"PHILADELPHIA, Sept. 9, 1851.

"MESSRS. BEEBEE & CO.

"GENTS.—We have yours of the 6th inst, asking for an order for the gold dust that may come from S. Beebee Ludlow & Co., of San Francisco, to us, under your policy.

"This we cannot admit, as we have no right to use their property except for the legitimate purpose for which it is intended, viz.: for paying their indebtednes to us, and the drafts for which the shipments are made. We have already given you an order for the $13m. per Union, and Willis & Co. an order for $8m. and odd—the balance between this and the amount they owe us will scarcely pay our indebtedness to our correspondents.

"*We some days since made an assignment of all remittances*

to come from S. B. L. & Co. for the payment as above stated.

"Yours respectfully,

(Signed) "LUDLOW & CO.

"If the gold per Union is coined, please give us the amt. of proceeds."

The member of the firm of Beebee & Co., who testified that *their* letter of the 6th was not in their letter book, deposed that *he* had no knowledge of receiving any such letter as this of the 9th, and that if *they* had received such a letter, *he* would have recollected it. He said: "I have *caused* an examination to be made by the *clerk having charge of the letters,* and can find none," meaning none of the date. If the clerk had himself been examined, and proved the search, it would have amounted to nothing, because a reply to a letter purposely out of the letter book would not probably have been in the file of *regular* letters in his charge. There is, in the evidence, therefore, nothing tending to negative the receipt of the letter of the 9th by the other member of their firm. A letter from them of the 10th, which will be mentioned presently, without acknowledging formally its receipt, appears to have been written with a reference to its contents.

There is thus no reasonable doubt that the letter of the 9th of September was received by Beebee & Co. It is, at all events, quite certain that it was written by the defendants. A machine copy of it is in their press letter book, which is, against them, the best possible secondary evidence of its contents. It shows, on their part, a proper sense of their duty to S. B. Ludlow under their agency, and to the draft holders under their appropriation of the 1st of that month. But, probably from carelessness in the use of language, they seem, unintentionally, to have intimated in it, contrary to the truth, that after the payment of the two orders for, together, $21,611.03, a balance would still remain due to them on general account by S. B. Ludlow. This, perhaps, gave to Beebee & Co., an apparent

reason for urging the defendants to give to them an order to retain an additional portion of his remittances. But it afforded no pretext of an excuse for the retention of any portion of them by Beebee & Co. without some such appropriation.

Of the bullion invoiced at $15,303.50, included in this remittance, a portion, in value rather more than a third of it, is said to have been seized and detained under attachments. The residue of the bullion was received by Beebee & Co., who, on the 8th of September, handed it over to Willis & Co. By a writing of this date, Willis & Co. engaged to return any surplus which this bullion might produce above the $8,302.63.

Beebee & Co. refused to accept the seconds of the two bills on themselves, which were protested and returned, with the protests, to William Taylor, by his correspondent. Beebee & Co., on the 10th, credited their amount, $6,000, to the defendants; and, on the same day, wrote a letter to them, inviting one or both of them to New York, and saying: "The drafts" (meaning these two bills) "we have passed to your credit, believing we have the best right to them, and you have used our funds to pay Sam's drafts," meaning S. B. Ludlow's drafts paid by the defendants before their failure. This letter, so far as intelligible, indicates that Beebee & Co. may then have thought S. B. Ludlow still indebted to the defendants in a balance equal to this amount of $6,000 or more. Beebee & Co., if they then thought so, cannot long have entertained such a belief. But nothing in the correspondence indicates that the defendants corrected, at the time, or even perceived the mistake, in this respect, into which their letter of the 9th may have temporarily led the New York house.

The defendants, on the 12th of September, 1851, in one of the destroyed letters, advised S. B. Ludlow, if he shipped gold, to consign it to William Taylor. This proves that they had not, at this date, abandoned their purpose of carrying their appropriation of 1st September, 1851, into effect for the benefit of the draft holders. It also indicates that they had then detected, in Beebee & Co., a purpose to detain, if they could, S. B. Ludlow's remittances in order to defeat this appro-

priation, of which they had been apprised by the letter of the 9th.

If, at this crisis, the defendants had, with a firm persistence, maintained this appropriation, Beebee & Co. must have yielded. They had not, as yet, ventured further than to make a show of detaining the $6,000 in bills on themselves. But the letter of instructions under which they had received the firsts of these bills had left them no discretion between the alternatives either of accepting them and sending them to the defendants, or of returning them protested to California with notice to the drawers. Their act of passing them to the defendants' credit in an account in which the remitter had no interest whatever was a palpable fraud and legal nullity. Thus, the seconds of exchange, which had been duly protested, were in full force. Notice of their dishonor could have been sent by William Taylor or by the defendants to the drawers; and, as the first mail since the arrival of the bills was not to leave until the 15th, ample time was left for sending such notice. This return of the paper with notice of its dishonor would, probably, have ruined the drawers. They were the friends and agents of Beebee & Co., who probably *could* not have permitted such a destruction of their credit. That they *would* not have permitted it was tested on a subsequent occasion which will be mentioned hereafter. As to the bullion, Beebee & Co. would not have ventured to appropriate it to their own use, or have pretended that they had a right so to do, unless they had been able to procure from the defendants a writing purporting to sanction such a diversion of it from its destination. George W. Beebee was afterwards cautious on this point when he was examined as a witness. To the question, "What remittances for Ludlow & Co. have been received by you since the 25th August, 1851?" he answered, "We received consignments from S. B. Ludlow & Co.; when asked to remit Ludlow & Co. we did so, *unless we were advised by Ludlow & Co. to make other disposition.*" A change of the intended disposition of the remittances by the defendants, after the notice which Beebee & Co. had received in the letter of 9th September, 1851, could

not vest in Beebee & Co. a valid interest. But it might serve to screen the motive of the intended malappropriation of the bullion as the subject of a bailment to them as transporting agents; and might thus relieve them of a serious hazard which they appear to have been unwilling to encounter.

Until after the 12th of September, 1851, nothing culpable appears to have been done by the defendants as to the remittance which had arrived, or as to those which were expected. But before the 15th of that month some evil influence, which the evidence has not disclosed, seems to have intervened. When the bills on Hoge & Co., accepted by these drawees, had been returned from New York to William Taylor, he had handed them to the defendants. From their hands, they passed, on the 15th or earlier, into the possession of Beebee & Co., by whom they were, on that day, credited to the defendants in account, with a discount of seventeen days' interest. George W. Beebee deposes that Beebee & Co. "received from Ludlow & Co., under date of 15th September, two acceptances of Wm. Hoge & Co. for $3,000 each, together making $6,000, less interest seventeen days, $19.83, making the amount to the credit of Ludlow & Co. $5,980.17 as per their order." The account of Ludlow & Co. on the books of Beebee & Co. contains a credit corresponding precisely with this testimony. The seconds of exchange, in this case, appear to have been received by Beebee & Co. from the defendants, who retained the firsts of these two bills.

The bad influence of which this was the first result that is known must have begun to have a determinate effect upon the defendants' conduct a day or two before this date of the 15th of September, as it prevented notice of the dishonor of the bills on Beebee & Co. from being mailed for transmission to the drawers by the steamer which was to sail on that day for California.

From this period, the defendants appear to have blindly surrendered their will and freedom of agency to the direction of Beebee & Co.

On the 17th September, 1851, the defendants wrote to Bee-

bee & Co., "We sent you last night the paper executed for the gold dust," etc. The paper thus mentioned appears to have been without any date until its arrival at New York, where a date was inserted. It must have been one or the other of the two following papers, both of which were, at about this time, subscribed by the defendants. That which bears the date of the 12th is unquestionably antedated. If it was not the one transmitted on the night of the 16th, it probably was not executed until after they had executed that of the 18th, which, perhaps, may have been executed on the day of its date. The testimony on the subject is confused and obscure, the only point certain appearing to be that the paper purporting to be prior of the two in date is antedated.

The two papers are of the following purport:

"PHILADA., Sept. 12th, 1851.

"MESSRS. BEEBEE & Co.,

"New York.

"GENTS.—In consideration of our indebtedness to you, we hereby transfer to you all gold dust, coin, bills of exchange, credits, or other moneys which have been consigned to us by Messrs. S. Beebee Ludlow & Co., of San Francisco, and which are in your possession, you having received the same under your policies of insurance, and otherwise growing out of our business relations with you.

"Yours, very truly,

"LUDLOW & CO."

"In consideration of our indebtedness to Messrs. Beebee & Co., of New York, we hereby authorize and empower them to receive and apply to our credit of their claim against us, all gold dust, gold in bars or coined, consigned to them, or to be consigned to them, for our account, and bills of exchange and drafts made payable to our order.

"LUDLOW & CO.

"PHILADELPHIA, Sept. 18, 1851."

If the date of the paper which now bears that of the 12th of September, was not inserted until after it had left the defend-

ants' possession, there is, unfortunately, no reason to doubt that the purpose of the parties at New York to antedate it was known to the defendants. The defendant, Robert M. Ludlow, seems to have been unable to devise any pretence of self-excuse for their conduct at this period. On 24th September he wrote to S. B. Ludlow as follows: "We wrote you and sent duplicates on the 9th, 11th, and 12th Sept. * * * *In my last I advised you, if you shipped gold, to consign it to W. Taylor, But that will not answer. Send, as before, to Beebee & Co.* * * * You will consign everything, as heretofore, to Beebee & Co., for safety. * * * I sometimes feel as if I should lose my senses, and go crazy. Come home and do not wait for trouble in California. *Nothing can be done here till you return in paying drafts*—hope before this reaches California you will be on your way back. *Destroy all the letters I have sent you.*" S. B. Ludlow's deposition states that he "burned up or destroyed" his correspondence with Ludlow & Co. before he left California, except one letter—probably this one. He avoids assigning the direction in this letter as his motive for destroying the previous correspondence. But his destruction of it is not reasonably attributable to any other cause. The act, as has already been said, was one of extreme culpability. The suggestion of it on their part was more culpable, as he was not then fully informed of their misappropriation of his funds.

The letter of the 24th of September shows on its face that it was the defendants' first intimation to him of a purpose to annul the appropriation of the remittances for the security of the draft holders made on the 1st of that month. This letter of the 24th of September did not reach him until some time after his letter of 14th October, 1851, in which he ratified that appropriation, had been written and was on its way. Their previous communication to him of the existence, and contents or intended effect, of the paper of 1st September, 1851, had vested in him an optional right of adopting the appropriation retrospectively to its date, as his and their concurrent act. This option was finally determined by his letter of ratification

of 14th October.* If the defendants, as between themselves and him, could have revoked the appropriation by a letter of countermand received by him before his option was thus determined, they could not revoke it by a countermand not received by him until afterwards. The letter of 24th September, therefore, had no effect as a revocation or countermand.

The draft holders had, as we have seen, under the paper of 1st September, 1851, an equitable interest in the proceeds or avails of the remittances, which, independently of any potential ratification of it by S. B. Ludlow, were appropriated by it for their security. The precise time of the defendants' attempted annulment of this appropriation is not material as between them and the draft holders. Though the subsequent paper which bears the date of 12th September, 1851, was not antedated, it could not operate as an effectual revocation of the security which the previous paper had created. For the benefit of the draft holders, the security created by the paper of 1st September, 1851, had taken effect from its date and had, in the meantime, been acted upon, so as to be vested irrevocably.

On this point there is no analogy in the cases which have been cited in argument of revoked, cancelled, or abandoned papers, which had never been delivered, or published, or acted upon. There is, moreover, no analogy to the cases also cited of English composition deeds which require creditors to become parties, or otherwise assent before the deeds are to take effect in their favor, or to such assignments for the benefit of creditors as require the release of their debts, or surrender of their securities, or the fulfilment of other onerous conditions. Upon the authority of Thompson *v.* Leach, decided in England by the House of Lords, 2 Ventr. 208; 3 Lev. 285; Show P. C. 151; 3 Mod. 296, 331, the rule of decision in Pennsylvania has been to presume an absent party's acceptance of a security beneficial to his interests, from the time of its creation, though he may then have been ignorant of its existence. In the well-known case of Wilt *v.* Franklin, 1 Binney, 518, 519, 520, this

* Ante, p. 106.

rule was applied to the case of an assignment for the benefit of creditors ignorant of its existence to a trustee who lived at a distance and was also ignorant of its existence. The property transferred remained in the possession of the assignor, on whose behalf the assignment had been prepared under the direction of a member of his family, who, or the assignor, had possession of the paper from the time of its execution on the night of Saturday until the evening of Tuesday, when it was handed to a messenger to be taken to the assignee, who did not receive it or know of its existence until the next day, Wednesday, when he gave to it his assent. An execution at the suit of a creditor of the assignor, having been levied on the intervening Monday, the question was whether, as against the sheriff, the property levied on had passed by the assignment. The decision was that it had passed by the assignment, which *had taken effect on the Saturday night.* Chief Justice Tilghman, after saying it was rightly conceded that where a deed is for the benefit of the grantee, it is reasonable that his assent should be presumed, said: "I think it reasonable to make the same presumption where the grantee is required by the deed to do an act useful to his neighbor, and not injurious to himself. This presumption is liable to be rebutted by showing an express dissent. A man cannot be forced to accept a conveyance against his will. But, in the present instance, the presumption is confirmed by the assent of the grantee, the moment he was informed of the consequence." This rule of presumption of acceptance has been followed in the very recent case of Henderson's Appeal, 7 Casey, 504. If any doubt of the correctness of the decision in Wilt *v.* Franklin has ever arisen from the fact that an adversary proceeding had intervened before anything whatever had been done under the assignment by anybody, there can be no doubt of the existence of such a rule of presumption, or of its applicability to cases like the present between parties and privies to the intended security, or to cases between parties or privies, and creditors proceeding adversarily *after* the security has been acted upon by the party who created it. The presumption, or implica-

tion, of the assent or acceptance of an absent party whom a security benefits, has been made by the Supreme Court of the United States, in the cases reported in 11 Wheaton, 96, 97, and 16 Peters, 118, 119, decided on the same principle as Wilt *v.* Franklin. These cases were cited with approbation in 8 Howard, 440. The older English authorities on the subject at law, and in equity, had been reviewed by Chancellor Kent in 1 Johns. ch. 255 to 258, and by Bayley, J., in 5 Barnw. & Cress. 671. See also 11 East. 623; 5 Serg. & R. 320.*

Under this doctrine, the circumstance that the paper of 1st September, 1851, was an *unsealed* writing, was unimportant.† If it would have been effectual with a seal, the debts and liabilities which it secured were a sufficient consideration to support it without one. (8 Howard, 429, 440; 16 Peters, 16 to 22; 9 Mees. & Welsb. 419 to 422.) In Grove *v.* Brien, 8 Howard, 423, a manufacturer of nails, at a place in Maryland, near Harper's Ferry, was indebted to Gilmor, of Baltimore, to Grove, of Alexandria, and to Fowle, of the same place. To Fowle he had been in the habit of consigning nails for sale on commission. On 14th March, 1843, he made a shipment of nails to Fowle by a canal boat, the master of which gave him a receipt for them to be delivered to Fowle, of Alexandria, for the use of Gilmor. This manufacturer, on the same day, wrote to Fowle that they had been thus consigned to him for the use of Gilmor. There was no privity between Fowle and Gilmor, who was not even informed that the consignment had been made. On the arrival of the boat at Alexandria a few days after, the nails were attached as the property of the manufacturer, under a proceeding at the suit of Grove. It was decided that the attachment could not be supported, because the property had been transferred for the use of Gilmor from the time of the delivery to the master of the boat. As to the objection that Gilmor had not assented to the transfer of the property to him as security for his demand

* See ante, p. 18, the 15th proposition.

† Ib. the 14th proposition.

against the shipper until after the levy of the attachment, the court said that *in the case of an absolute assignment of property by a debtor to his creditor for the purpose of securing a pre-existing debt, an assent will, in the absence of all evidence to the contrary, be presumed on account of the benefit that he is to derive from it.* In Mellon's Appeal, 1 Grant, 212, the Supreme Court of Pennsylvania, notwithstanding the law of the State concerning preferences in assignments, sustained a particular assignment appropriating a judgment for the special security of a creditor of the plaintiff in the judgment, made by this plaintiff when he was about executing a general assignment for the benefit of his creditors. This particular appropriation of the judgment, made directly to the creditor to be specially secured, but without this creditor's knowledge, took effect from a mere delivery of it to the person who was assignee under the general assignment.

Even a *voluntary* deed of trust may take effect in favor of beneficiaries ignorant of its existence. As to both real and personal estate, such a deed, though the grantor has, from the time of its delivery, retained it in his own possession, binds parties and privies; and, as to personal estate, which is not within the statute of 27 Eliz. c. 4, is valid even against purchasers. (1 Vern. 100; 2 Vern. 473; Pr. Ch. 235; 7 Br. P. C. 410; 3 Meriv. 256, 270, 271; 3 Swanst. 411, (*n*); 1 Eq. Ab. 168; 6 Ves. 656; 3 Hare, 532; 18 Ves. 84; 2 Younge & Coll. Ch. 451; 4 Hare, 67; 2 Myl. & K. 496, 503; 1 Sim. & St. 315; 1 Johns. Ch. 336 to 338, 256 to 258.) A sealed or unsealed assignment in trust for the security of an existing debt, ought, much more, from the character of the consideration, to be deemed irrevocable. The consideration, according to the preponderance of authorities, is *valuable.* This preponderance is determined here by the weight of opinions of the Supreme Court of the United States. Effect would, therefore, be given to the security in equity, though it were, in form, so incomplete or imperfect that a court of equity would not, if it were a mere *voluntary* transfer, carry it into effect.

In England, the subject has, however, been somewhat perplexed by a class of cases originating in two decisions of Lord Eldon, one of them in direct opposition to the decision of the Supreme Court of the United States in Grove *v.* Brien (8 How. 429), above cited, the other in as direct opposition to Wilt *v.* Franklin (1 Bin. 502), and Henderson's Appeal (7 Casey, 504), decided by the Supreme Court of Pennsylvania, and the several coinciding opinions of the Supreme Court of the United States which have been mentioned. (Ante, p. 144.)

The decision in opposition to Grove *v.* Brien, has, after some fluctuation of opinion, been overruled in England. The case was Exp. Heywood (2 Rose, 355), where A. was a member of the firm of A. & B., and also of the firm of A. & C., the latter of which firms, being indebted to the former, consigned a shipment of merchandise to a factor, with directions to pay, out of the proceeds, to the former firm, a given sum on account of this debt. A. & B. were at the same time advised by A. & C. that this direction had been thus given to the factor. The question, stated as having been presented under proceedings in bankruptcy, was, whether A. & B. had any *lien* on the proceeds of the consignment. Lord Eldon expressed his opinion that there was none, but ordered an issue upon the question stated *in this form.* The trial of the issue before Lord Ellenborough resulted in a non-suit. He "was of opinion that there was no *lien,* which in its legal sense meant a right to *possess* or to *retain.*" According to the report, he added that the direction as to the proceeds "gave no specific interest in them to" A. & B. The former part of the opinion that there was, in a technical sense, no lien, is clear law. But the proposition that A. & B. had no specific interest in the proceeds, whatever apparent countenance it afterwards received in Garrard *v.* Lauderdale (3 Sim. 1, 2 Russ. & M. 451), and more particularly in Malcolm *v.* Scott (3 Hare, 46), could not now be supported in England. The circumstance that A. & B. were advised of the direction to the factor, in the execution of which they were interested, converted his agency into a trust for their security. The

dicta in Acton *v.* Woodgate (2 Mylne & K. 495), and Brown *v.* Cavendish (1 Jones & Latouche, 635), and the decisions in Wilding *v.* Richards (1 Collier, 661, 664, 665), and Walker *v.* Rostron (9 Mees. & W. 411, 421), show that the direction to the factor and its communication to the creditors constituted an *appropriation* for their security, which was not revocable except by the consent of all parties. Had not the direction been communicated, it would, as a simple order from the debtors to their own agent, have been revocable by them except so far as a difference might perhaps have arisen from the fact that one of them was a member of both firms.

The case in opposition to Wilt *v.* Franklin was Walwyn *v.* Coutts (3 Meriv. 707, 3 Sim. 14), decided by Lord Eldon in 1815, a short time before his decision in Exp. Heywood. In Walwyn *v.* Coutts, an assignment was made by deed, in trust for the benefit of creditors, none of whom were parties to it, or to any agreement under which it had been made, and from whom no release or other consideration, in the language of the report, had moved. Lord Eldon decided that the trust might be revoked or varied by the party who had created it. The reason of the decision stated in the report is, that the *trust* was *voluntary*. When the question was reconsidered in Garrard *v.* Lauderdale (3 Simons, 1, affirmed in 2 Russ. & M. 451), Lord Brougham concurred with Vice-Chancellor Shadwell in opinion that though the conveyance was to be deemed voluntary, the decision of Lord Eldon could not be supported on this general ground. It was followed by them on the distinct ground that such an assignment by a debtor of his property for the payment of his debts may be understood as a mere imperfect executory disposition which he has directed for his own benefit, under a trust of which, if it is to be regarded as merely voluntary, the creditors to be paid cannot, when they afterwards discover its existence, compel the execution. According to Sir Knight Bruce, this doctrine is, that the writing, which is, in form, a *deed of trust,* is thus revocable when it appears to have been intended, as, in effect, an *instrument of agency,* but is not revocable when it appears

to have been intended as, in effect, the creation of a trust. (1 Collier, 663 to 665.) Lord Brougham, in tracing the doctrine to former indications of its undeveloped existence, admitted the distinction in which he thought that it had originated to be somewhat obscure. (2 Russ. & M. 451.) Lord Cottenham, intending, perhaps, to refer to this review of the subject by Lord Brougham, afterwards observed that the doctrine, though not new law, probably had its foundation in Walwyn *v.* Coutts. (See 2 Drury & Walsh, 437, where the report is fuller than in 7 Cl. & Fin. 792.) Lord Cottenham, when Master of the Rolls, had said that the distinction was somewhat refined. While he professed a wish not to have it supposed that he entertained any doubt of the propriety of the doctrine, he avoided expressing an opinion whether the views of the relations of the creditors and the trustees, on which it had been founded, were correct. (2 Myl. & K. 510, 511.) Sir Knight Bruce, when Vice-Chancellor, intimated an unwillingness to act upon the authorities on the subject further than they might possibly compel him to act contrary to the opinion that, in their absence, he would have entertained. (1 Collier, 659, 660, 664.) From the deference due to Lord Eldon's opinion, his decision has, under these restrictions, been followed in England, so far as to induce the Privy Council to reverse a decision of the Supreme Court of a British Colony in which the doctrine had been disregarded (3 Mo. 445, 450, 451), and the House of Lords to reverse a decree of the Chancellor of Ireland, by whom its application had been overlooked. (7 Cl. & Fin. 772.) But Lord St. Leonards, when Chancellor of Ireland, afterwards thought that the doctrine of this class of cases had been carried beyond the intention of those who, he said, had originally introduced it, and manifested very clearly his purpose to extend it no further than a proper deference to the precedents might require. (4 Drury and Warren, 406, 408; 1 Jones and Lat. 635.)

These definitions of the doctrine, and the opinions as to its proper limitation, could not be reconciled with a similar deference to the authority of Exp. Heywood. With reference

to the doctrine of this case, as partially recognized in Garrard *v.* Lauderdale, the Master of the Rolls, in Acton *v.* Woodgate, (2 Myl. & K. 495), said: "it seems to have been considered that a communication by the trustees to creditors, of the fact of such a trust would not defeat the power of revocation by the debtors. It appears to me, however, that this doctrine is questionable, because the creditors, being aware of such a trust, might be thereby induced to a forbearance in respect of their claims, which they would not otherwise have exercised." This opinion, followed by Sir Knight Bruce, in Wilding *v.* Richards (1 Collier, 656, 665), and approved by Lord St. Leonards when Chancellor of Ireland in Brown *v.* Cavendish (1 Jones & Lat. 635), has been sustained by the decision of the Court of Exchequer in Walker *v.* Rostron (9 M. & W. 411), all of which cases have been cited. But such a trust would not now be sustained in England, in favor of a creditor, upon a bare communication to him of its existence, followed by its immediate revocation, or upon a communication of its existence to him under any other circumstances indicating that it could not have been, or was not, relied on by him as a security.

In Pennsylvania, before the decision of Walwyn *v.* Coutts, the subject had been relieved from liability to the embarrassment attendant upon such refined, if not over nice, distinctions, by the adoption of the rule of *presuming acceptance of a beneficial act.* The subsequent sanction of this rule of presumption by the Supreme Court of the United States, determines, of course, its application by this court in the present case. Under it, the distinction between a creditor who is a party, and one who is not a party, to an instrument creating a trust of this description, becomes unimportant. So far as Walwyn *v.* Coutts is followed in England, it rests entirely on this distinction. In Exton *v.* Scott (6 Simons, 31), a person accountable to parties *already* trustees for other persons, executed a mortgage to the trustees to secure the amount. The mortgage was privately prepared by himself, was in his own handwriting, and was executed in his private office, when no one was present except himself and his clerk, who, as a

subscribing witness, attested its execution. Twelve years afterwards he died insolvent. The mortgage was found, after his death, in a chest containing his title deeds. There was an affidavit of one of the mortgagees that the debtor had orally promised to execute such a security; but its actual existence had not been known to either of them, or to any person interested in it as a security. Nevertheless, it was held that the security had taken effect from the time of its execution; and its validity was sustained against the general creditors of the mortgagor. (See, also, 3 Hare, 532; 4 Hare, 67.)

The paper of 1st September, 1851, was, however, not such an instrument as is denominated in books of reports, and in statutes of Pennsylvania, and of other States, an assignment, or partial assignment, for the benefit of creditors;* nor was it, like the letter of advice in Grove *v.* Brien, an original security for a debt. The funds appropriated could not, without the *mutual consent* of S. B. Ludlow and the defendants, have been applied in any manner *less* beneficial to the draft holders than was provided in this paper. Had no such paper existed, the remittances might, as we have seen, have been disposed of differently by the *concurrent* act of S. B. Ludlow and the defendants. As *between them and him,* however, the funds had *already* been appropriated, conformably to the provisions of the paper. This original appropriation, unless revoked or modified by their *mutual consent,* would, therefore, have inured incidentally to the benefit of the draft holders. The only effect of the paper of 1st September, 1851, was to prevent this incidental effect of the original appropriation from being any longer liable to revocation or change by a concurrent act of the original parties. In Powles *v.* Hargreaves (3 De G. Macn. & G. 430), already cited, this effect was the *indirect* result of a general assignment for the benefit of creditors, which declared no such trust as to the particular fund there in question.

In the present case, the direct result is produced by a paper

* See ante, p. 19, the 18th head.

of which it was the *intended* effect. So far as the intended security could be derived through rights or interests of the defendants, who executed the paper, the reason that the appropriation should *immediately* take effect for the benefit of the draft holders, was, therefore, much stronger than in the case of an original appropriation for the security of a debt, or in that of an assignment for the benefit of creditors. (See 2 Brockenb. 277; 21 How. 78.)

But, the facts in evidence present such a case that this paper, if its effect were determinable according to the doctrine established in England, by Walwyn *v.* Coutts, as explained by Garrard *v.* Lauderdale, and subsequent English decisions, would have been irrevocable. We have seen that immediately upon the execution of the paper, on the 1st of September, 1851, the defendants informed S. B. Ludlow of its existence, and on the 12th of that month, advised him by letter to send his remittances directly to the party named in it as assignee, that they and this party had, in the meantime, so indorsed bills of exchange, which were a *portion of the remittances described in it,* as to recognize its existence, and had caused the dishonor of these bills, with such indorsements, to be registered in a notarial protest—that the defendants wrote on the 9th of that month to Beebee & Co., the forwarding agents of the remitter, notifying them of the existence of the paper, and that the defendants had on the 6th, in a letter to complainants in this cause, held the paper forth as an instrument in actual and prospective operation. No court of equity could, upon such facts decide that the draft holders had not, on the faith of the existence of such a security, forborne to adopt adversary measures. No court of equity would sanction under such circumstances, the revocation or annulment of the security.*

We will hereafter see that, by the bill in the present case, the complainants, who received the letter of the 6th, did actually, on behalf of other draft holders, as well as themselves, adopt the security mentioned in that letter as one in which they had

* See ante, p. 18, the 16th proposition.

a common interest. But, independently of any effect of this adoption of it, enough had, even according to these English decisions, been done before the 12th of September to render the paper irrevocable on or after that day, without the consent of the draft holders.

That the remittances which were the intended subject of the paper of 1st September, 1851, were not in the defendants' possession at its date, and that a portion of them had not even been shipped from California, were, in equity, circumstances immaterial to the validity of the security. (See The Warre, 8 Price, 269 (n); Bunbury *v.* Winter, 1 Jac. & Walk. 262; Langton *v.* Horton, 1 Hare, 556, 557; Douglas *v.* Russell, 1 Mylne & K. 488, affirming 4 Simons, 524.)

The history of the remittances, from the misappropriation of the two drafts upon Hoge & Co. on the 15th of September, to the filing of the bill in this case on the 8th of October, may be briefly told.

The bullion which had been received by Willis & Co. on the 8th of September, having been coined, its proceeds were accounted for by them to Beebee & Co., who credited the amount, $10,471.43, to the defendants on the 19th of that month, charging them with $8,302.63 as paid, by their order, to Willis & Co.

Of the remittance which arrived on the 20th of September, 1851, the bullion invoiced at $6,105.37 was immediately sold by Beebee & Co. They received the price in two payments, and credited the respective amounts to the defendants, $5,000 on the 20th, and $1,370.10 on the 29th of September, 1851. The residue of the remittance was in a bill of Burgoyne & Co., at five days' sight, on Beebee & Co., for $6,500. *This bill was transmitted by the defendants in a letter of the 22d to Beebee & Co.,* who, on the 23d, credited the defendants with $6,491.33 as its amount, less the discount of eight days interest; and, on the same day, by mail, informed them that this had been done.

Of the remaining remittances, the portions which were in

bullion are said to have been attached at New York, and to have remained under attachment.

Of the remittance which arrived on the 5th of October, 1851, $20,000 was in bills of Burgoyne & Company on Beebee & Company, at twenty days' sight. These bills must have been received by the defendants at Philadelphia on the 6th of October, and must have been transmitted by them on that day to Beebee & Company, who, on the 8th, acknowledged the receipt of them, stating that they were credited to the defendants less the discount. They had been thus discounted and credited by Beebee & Company to the defendants on the 7th, which was the day before the bill in the present case was filed. The net amount of this credit of the 7th of October was $19,966.45.

If these could have been deemed regular credits by Beebee & Company to the defendants, the respective amounts would, of course, have been credited by the defendants to S. B. Ludlow. But the defendants, as their answer states, and as their books of account show, made no entries in these books after their failure. This proves their own consciousness of the impropriety of their conduct.

In excuse for it their counsel has, in argument, suggested that, possibly, the defendants might not have been able to get the remittances out of the hands of Beebee & Company. The suggestion would not have been available in law if it could have been sustained upon the facts of the case. Agents or bailees who, not having prevented the commission of a wrong injurious to the interests of an owner of property confided to their care, endeavor to excuse their default on the ground that the perpetration of the wrong could not have been prevented, cannot sustain the defence if they themselves have done anything to bring about, or facilitate, the perpetration of the wrong. In such a case, at all events, they cannot excuse themselves by merely alleging that the wrong *might* have happened notwithstanding any efforts that could have been made for its prevention. Nothing short of proof that it *must* have happened will avail for their excuse. An allegation to the latter effect is not often entertained. A navigator who deviates from the course

of his voyage, cannot, when sued by the owner of a cargo lost, after the deviation, in a storm, sustain a defence upon the ground that if the deviation had not occurred, the same storm would have caused a like loss in the regular track of the vessel. Chief Justice Tindal answered such a defence when attempted by the owner of a vessel by saying "that no wrongdoer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened, while his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up, as an answer to the action, the bare possibility of a loss if his wrongful act had never been done." (6 Bingh. 724.) Here the defendants themselves perpetrated a series of wrongful breaches of their duty. On or before the 15th of September, they handed Hoge & Company's acceptances to Beebee & Company to be misappropriated. Afterwards they subscribed the two transfers which are dated respectively the 12th and 18th of that month, in order to facilitate Beebee & Company's intended malappropriations. The letter to Beebee & Company of the 22d of September, enclosed the bill for $6,500 on Beebe & Company themselves, that it might be misappropriated; and they sent, on or about the 6th of October, the bills for together $20,000, to Beebee & Company for a like evil purpose. Consequently, the defendants were actual participants in the fraudulent conversion of the remittances to Beebee & Company's use. But, had this been otherwise, the suggestion that they could not by the adoption of proper measures, in S. B. Ludlow's name, or in their own, have prevented the fraud, would not have been sustainable upon the facts in evidence. The suggestion, though made on their behalf by counsel, does not appear to have ever been made by themselves.

An allegation by themselves, as well as by counsel, has been that they made the transfers to Beebe & Company under the influence of an apprehension that the remittances might be intercepted at New York, by processes of attachment. We have seen that such attachments could not have been so prosecuted as to prevent the execution of the trusts of the paper of 1st Sep-

tember, 1851. But there cannot have been an apprehension of attachments at the suit of parties other than particular draft holders interested in these trusts. These draft holders could, at the worst, have obtained under the attachments, only a very small amount more than their dividend under those trusts. If attachments at their suit had been maintainable with such a result, it would have been far less disastrous and unjust than the transfer of the remittances to Beebee & Company in order that their proceeds might be credited by them to the defendants in an account in which neither the draft holders, nor the remitter, had a particle of interest. This allegation, therefore, furnishes no pretext for an excuse of the defendants' conduct.

Their actuating motive appears to have been the corrupt influence of an expectation that, if they would make this misapplication of these remittances, which Beebee & Company solicited, Beebee & Company would assist them with money to conduct their future business. There can be little, if any, doubt that Beebee & Company held out the inducement of a promise of such assistance. In the course of an examination of the elder Mr. Ludlow, hereafter mentioned, we find the following questions and answers, which, if not thus explained, are not easily intelligible:

"*Question.* These funds of S. B. Ludlow & Co., which have been remitted to meet exchange—did you, or did you not, hand them over to Beebee & Co., to be appropriated to the payment of your debts to them?

Answer. I did so; both for the security of S. B. Ludlow & Co., and ourselves, to prevent attachments, as we were largely indebted to Beebee & Co., *hoping that they would assist us as they have heretofore done.*

Question. How should that secure S. B. Ludlow & Co? I mean handing over these funds to a third person?

Answer. When we pay off our indebtedness to them (Beebee & Co.), these funds of S. Beebee Ludlow & Co. would be their property, i. e., S. B. Ludlow & Co.'s.

Question. Handed over to them by Beebee & Co.?

Answer. Either to them or us.

Question. To you, for S. B. Ludlow & Co.?

Answer. For their account."

The want of an account in the books of the defendants from August, 1851, to 8th October, 1851, when the bill in this case was filed, has been fully supplied by their account in the books of Beebee & Co., of which a transcript is in evidence. The correspondence, and George W. Beebee's deposition as to each item entering into the account, would also supply the deficiency. He deposes that their books do *not* contain entries of amounts which, in consequence of attachments, they did not receive. His words are: "There have been consignments to us that we have not received at all. They have been attached by various parties. *The books do not show these.*" The amount of the funds which have *not* been detained under attachments is, therefore, ascertainable from these books.

The credits which enter into the account have already been stated, but will be restated.

The credits of avails of *bullion* since the defendants' account of August, 1851, may be thus recapitulated:

Proceeds of the delayed remittances by the Union credited on the 5th September,		$14,115.66
Proceeds of the unattached portion of the bullion included in the remittance which arrived on 5th September, 1851, credited on 18th September, 1851,		10,471.43
Proceeds of the bullion included in the remittance which arrived on 20th September, 1851, credited on that day,	$5,000.00	
And on 29th September, 1851,	1,370.10	
		$6,370.10
Gross proceeds of bullion credited,		$30,957.19

Brought forward		$30,957.19
From which the deductions to be allowed, were, insurances paid,....	$982.14	
freights paid, ...	247.40	
Eight oz. gold dust delivered under an order, ...	141.20	
A forged draft credited in the old account, ...	100.00	
A draft paid 25th August, 1851,....	50.00	
	$1,520.74	
Less credit 23d October, 1851, freight and insurance, ...	50.00	
		1,470.74
Net proceeds of bullion credited,.....		$29,486.45

The following is the recapitulation of credits of the proceeds of the remitted *bills:*

Of the $12,000 included in the remittances which arrived on the 5th of September, 1851, the bills on Beebee & Co. were credited on 10th September, ...	$6,000.00
And Hoge & Co.'s acceptances, less the discount, on the 15th of September, ...	5,980.17
The bill included in the remittance which arrived on 20th September, 1851, less the discount, was credited on the 23d of September,.....	6,491.33
And the bills included in the remittance which arrived on 5th October, 1851, less the discount, were credited on 7th October, 1851,.....	19,966.45
Proceeds of remitted bills credited,.....	$38,437.95

From the net proceeds of the bullion credited,....	$29,486.45
The orders of 16th August, 1851, in favor of Beebee & Co., and 29th August, 1851, in favor of Willis & Co., both for bullion, and both covered by the balance due to the defendants on 26th August, 1851, in general account, rendered it proper that this balance should be deducted, ...	21,622.67
The credit remaining from the bullion, was.....	$7,863.78
The credits for the proceeds of the bills, were....	38,437.95
	$46.301.73

Thus on 7th October, 1851, the day before the bill was filed, $46,301.73, with interest, which, if its account were averaged, would run from a prior day, was applicable to the payment of the draft holders in the manner set forth in the paper of 1st September, 1851.

The bill averred, and the answer admitted, that the complainants, Winter, Latimer & Co., to whom the defendants had written their letter of 6th September, 1851, stating that they had made an assignment of the remittances, and stating its effect, had, after the receipt of the letter, called upon the defendants for information *to whom* their assignment, or transfer of the remittances had been made, and that they had *refused,* or *omitted* to give such information. The date of this refusal or omission has not been shown. But a letter of Beebee & Co. to the defendants, dated on the 6th of October, two days before the bill was filed, indicates that Beebee & Co. were probably then devising means to prevent a discovery of the truth by these complainants, or other parties interested who might make inquiries on the subject of the remittances. This letter was in these words:

"*New York, Oct, 6th,* 1851.

"MESSRS. LUDLOW & Co.

"GENTLEMEN:—The box of eight thousand dollars of gold dust by Illinois, was attached in Norfolk, and the box by this

steamer Ohio also attached on board the ship and sheriff brought it off. This for your government.

"Very respectfully yours,

"BEEBEE & CO.

"We shall have to take steps to get them and quash attachments."

The steamer Illinois mentioned in this letter, due at New York on 20th September, 1851, arrived there on that day, having touched at Norfolk. No box of bullion containing $8,000 had been shipped in her by S. B. Ludlow. This appears negatively from his correspondence. The bullion included in his remittance by her, was invoiced, as has been stated at $6,105.37, and was disposed of, on her arrival, by Beebee & Co. for $6,370.10. *It was on board when she arrived at New York on the 20th of September.* George W. Beebee two months afterwards, deposed on the subject as follows: "On 20th September, 1851, we received a box gold dust consigned to us for Ludlow & Co.'s account, or to be forwarded by us to Ludlow & Co., which was attached at Norfolk. *On the receipt* of *that* gold dust, we sold the same, and received an advance of five thousand dollars. On the 29th of September we received the balance of proceeds thirteen hundred, seventy dollars and ten cents placed on our books to the credit of Ludlow & Co. as per his order." The $5,000 on their books is credited on the 20th, and the $1,370.10 on the 29th of September. If this bullion had been attached at Norfolk, it had been restored before the steamer resumed her voyage for New York. It is impossible, therefore, to read the letter of 6th October, 1851, without a very painful impression as to the motive under which it was written. The defendants, in their letter in answer, dated 10th October, said that it was "the first intimation that any gold dust was attached in Norfolk." The bill had in the meantime been filed.

When the bill was filed, three mails had arrived from California since the date of the paper of 1st September, 1851, without any payment having been made, or statement rendered, by

the defendants to the draft holders. The freight lists at New York would not show the amounts of S. B. Ludlow's remittances in bullion, as they came in the name of Beebee & Co., with large quantities which they were in the habit of receiving from other persons. As the remittances in bills came by mail, information concerning them was to be sought only from the defendants, who were disposed to give none. There was every reason to believe, as was in fact the case, that two other remittances dispatched before S. B. Ludlow's receipt of information of their failure, were then on their way from California.

This was the state of things when the bill was filed. It averred that the defendants' letter of 6th September, 1851, was the complainants' only information of the existence, contents, or effect, of the assignment mentioned in it, and that they did not know to whom it had been made. On these points they prayed a full discovery. They insisted that the draft holders, including themselves, were secured by an alleged independent primary appropriation of the remittances, entitling them to payment before the proceeds could be applied in discharge of any balance that might be due by the remitter to the defendants, and that, consequently, the draft holders' equitable rights could not be more than partially and inadequately secured by any such assignment as the letter described. But, the bill was framed so as to entitle the draft holders to the benefit of the security described in the letter as an assignment, if they could not obtain the relief which they prayed under the alleged previous appropriation.

The defendants, in their answer, filed on 14th October, 1851, denied that there had ever been any special appropriation by S. B. Ludlow of his remittances to secure the payment of his drafts upon them. The answer negatived every fact from which an inference that he had, in any manner, appropriated them generally, or specially, for the purpose, could have been deducible, unless his mere acts of remittance to agents on whom the series of his drafts was drawn implied such an appropriation. The respondents annexed a copy of the "instrument or paper purporting to be an assignment" of 1st September, 1851,

mentioned in their letter of 6th September. A copy of it has already been given at length. They described it as an instrument "without seal and not witnessed," and as having been "drawn without consultation of counsel" by one of them, Robert M. Ludlow, and signed by him in the name of their firm. They stated that "having learned a few days after that it was utterly worthless for the purpose intended, and invalid, the name of Ludlow & Co. was simply erased from it by the said Robert M. Ludlow." They said that they did "not consider the said instrument or paper purporting to be an assignment *of any force whatever*, the same having been cancelled, and having been otherwise informal, void, and useless for the purposes intended."

The defendants annexed to their answer their general account with S. B. Ludlow from 13th March, 1851, showing the above-mentioned balance of $21,622.67 to their credit at the time of their failure. The answer stated, in reply to interrogatories of the complainants, that, from about the dates of the particular drafts in their favor in respect of which their suit was brought, and since, the amount of gold, and gold dust, remitted by S. B. Ludlow to the defendants which had been received, and come to their hands, was about $50,183.10, as nearly as they could get at the sum in the short time allowed to make up the account; but that *several* invoices, the amount of which was *unknown*, had, since their failure, been seized upon and appropriated by creditors by attachment, *or otherwise;* and that they were *not advised* that there was any gold or gold dust on its way from San Francisco. This was all that the answer contained in the way of account or discovery. The sum of $50,183.10, appears to have been intended as an aggregate of certain items credited in the same cash accounts which resulted in the above-mentioned balance of $21,622.67, and, therefore, to have included nothing subsequent or extrinsic to that account. The answer thus contained no account, or statement, of uncoined or uncredited bullion on hand at the time of the defendants' failure, or of remittances in *bills* which had been *subsequently* received. As to remittances in *bullion* by

the three mails which had arrived since their failure, composing, as they said, *several* invoices of *amounts unknown*, all that they disclosed was contained in the vague reference to undefined *appropriations* by creditors under attachments, *or otherwise*. As to remittances by expected arrivals, one of which was about due, the statement that they had not been *advised* of such remittances, imported nothing, because usually the letters of advice came by the mail steamers which brought the remittances. The suppressions and evasions of the answer as to the correspondence with S. B. Ludlow and with Beebee & Co. have already been particularly mentioned (Ante, pp. 102, 103).

On 15th October, 1851, the day after the filing of this answer, there was an interlocutory hearing on an application for the appointment of a receiver. The question to be determined before the insufficiencies of the answer could be considered, was whether, as the case was then presented, upon bill and answer, the draft holders had any *interest* in the remittances.

We have seen that if the paper of 1st September, 1851, was in force, the draft holders had under it, independently of S. B. Ludlow's potential ratification of it, an equitable derivative interest of their own in the remittances. Its cancellation, if it had previously taken effect in interest, did not annul or impair its legal or equitable operation.*

The cases at law on this point are cited in 2 H. Bl. 262 to 264; 4 Barn. & Alders. 677; 4 Watts, 199. In Clavering *v.* Clavering, the House of Lords affirmed a decree in Chancery in a case in which a father had conveyed an estate in trust to raise two annuities in favor of his children, to commence after his death. He retained the conveyance in his own custody till his death, having in the mean time, by a subsequent deed, settled the estate in a different manner. In support of the latter settlement, it was argued in the House of Lords that, as the former settlement might have been cancelled by the father, he could annul it by the execution of a new one, but the prior settlement was sustained, (1 Br. P. C. 124; Toml. Ed. vol. 7,

* See ante, pp. 18, 19, the 17th proposition.

p. 410.) At the hearing in Chancery, Lord Keeper Wright had cited Lady Hudson's case, where a father, on a quarrel with his eldest son, settled an annuity on his wife in augmentation of her jointure, and afterwards, being reconciled to his son, cancelled the settlement which was found cancelled at his death. On a trial at law, the deed being proved to have been executed, was adjudged good, though cancelled. The son brought a bill in Chancery, which was dismissed by Lord Somers, (Pr. Ch. 235.) Sear *v.* Ashwell, (3 Swanst. 411,) is an authority to the same effect.*

Numerous facts above related, proving that the paper of 1st September, 1851, was in force when its attempted cancellation occurred, were not mentioned in the answer, or known at the interlocutory hearing on 15th October, 1851. But the answer showed that the paper had been acted upon for some days after its date, and that its existence as a security had, in this period, been communicated to complainants in the cause, as parties interested in its provisions. Therefore, if it had not originally been ineffectual for its intended purpose, it was apparently not annulled by the cancellation.

The answer did not state for what reasons the paper had been supposed *ineffectual,* unless they were included in the description of it as the act of one member only of the defendants' firm, and as unattested and unsealed. The general agency of partners for each other extends to acts of this description. (See 5 Cranch, 289; 13 Peters, 423, 433; 5 Watts, 24; 6 Watts & Serg. 310, 311; 1 Brockenb. 456; 4 Barnw. & Cress. 867, 879.) Such an act, performed by one of them in their partnership name, was, therefore, in law, their joint act. The want of an attestation in the case of a sealed instrument proved to have been delivered, or of an unsealed instrument shown to have taken effect, is immaterial. In the case of an unsealed writing, it is not even an informality. The remaining objection, of the want of a seal, has been disposed of under a former head, where other questions concerning this paper, more im-

* See ante, p. 146.

portant than those which the answer suggested, have been considered.

The complainants appeared, therefore, at the interlocutory hearing, to have an *interest in the subject* of controversy. When this conclusion was reached, the suppressions and evasions of the defendants' answer became the proper subject of consideration. That it had been studiously framed so as if possible to conceal some important facts, was apparent. Insolvency was admitted in the answer. As the relation of the respondents to the subject of controversy was fiduciary, the manifestation of such a purpose of concealment, or even the want of a proper and full disclosure of the truth, rendered the case one for the appointment of a receiver. But these evasions and suppressions had so concealed the subjects of a receiver's intended custody, that his appointment, without a compulsory discovery in aid of its object would probably have been useless.

The question was, how such a discovery should be obtained. The ordinary mode of obtaining, through exceptions to the answer, an adjudication of its insufficiency, and thus compelling the defendants to make a better answer, would have been attended with such delay as to frustrate the remedial purpose of the receivership. This is not the only mode of obtaining a better answer from a defendant whose accountable relation to the subject of controversy is *fiduciary*.

There have been two modes known in chancery practice of compelling a discovery by such a defendant, without a previous adjudication, or hearing, upon exceptions to his answer. One has been the summary method of examining a *defendant* upon interrogatories by a master. Under the other method, complainants, as well as defendants, are examinable by a master to whom the cause has been *referred* for some *purpose defined in an order* of the court, so that the investigation is limited strictly to this purpose. These two modes of *examining parties* appear to have been somewhat confounded by counsel in this cause, in argument.

The former method of examination, unless the defendant has been adjudged contumacious for a refusal to answer, or for

persistence in answering insufficiently, is now, in practice, almost, if not quite, obsolete. But, anciently every defendant served with a writ of subpœna was compelled, according to its literal mandate, to appear *in person* at the return day in chancery, and there submit himself to a personal examination which the chancellor conducted through an official delegate, who was usually one of the masters. The return by the master of such a personal examination was then the defendant's *answer in chancery*. Whether such a proceeding as is now called a cross bill was a necessary preliminary to a counter interrogation of the complainant, is, perhaps, doubtful. But with, or without, such a preliminary, the complainant was also examinable by a master at the instance of a defendant who could suggest a sufficient cause for such interrogation. In those days, the subpœna was not regularly issuable, under the original bill, until after the chancellor had, through a master, or other delegate, examined and approved the bill. Where a demurrer is now interposed on behalf of a defendant, an argument on the sufficiency of the bill might then precede the decision whether a subpœna should issue. The master, instead of deciding this preliminary question, sometimes reported it, in a case of doubt, to the chancellor, for his consideration. In order that the bills might not be prepared unadvisedly, the rule was, that none should be presented without the signature of a *counsellor*, as distinguished from a mere solicitor or attorney. Though the bill was thus exhibited under the sanction of counsel by whom it was, in most cases, probably, prepared, it was revised by the master who, probably, always regulated the form of the interrogative part. Afterwards, however, the preliminary scrutiny in chancery of the original *bill* was altogether dispensed with, by a rule that the subpœna should issue upon the mere presentment of a bill "subscribed with the hand of a counsellor at law." This change in the practice occurred more than three centuries ago. It occasioned a great increase in the number of suits in chancery. But, for some time afterwards, defendants, in original and cross bills, were, according to the former practice, examined, in person, by the masters. The consequence of the

changes which have been mentioned was, however, that, in the course of time, the defendant's answer was prepared and completed by his legal adviser, so that both parties, in this respect, stood on the same footing, and there was no longer any *judicial* intervention in the *primary* stages of chancery pleadings on either side. As demurrers to bills had, in the meantime, become frequent, so exceptions to answers followed, as of course, the latter change. These changes were not established until after cross bills had become the only proceeding under which a defendant could, before an interlocutory decree, interrogate a complainant. There was, in such respects, a reciprocation under cross bills of the practice established under original bills. The ancient practice of personal examinations of defendants by masters in chancery was restrained, therefore, within limits which the 70th of Lord Bacon's ordinances defined in the following words: "The defendant is not to be examined upon interrogatories except it be *in very special cases by express order of the court, to sift out some fraud, or practice pregnantly appearing to the court,* or otherwise upon offer of the plaintiff to be concluded by the answer of the defendant, without any liberty to disprove such answer, or to impeach him after of perjury." In the present case, the *fraud and artifice apparent* in the answer would, perhaps, have justified an order for the summary examination of the defendants according to the ancient practice. (See the cases in 1 Merivale cited in 2 Johns. Ch. 518.)

But, before the time of Lord Bacon, the practice of making orders of reference for defined purposes, with power to examine parties concerning the matters referred, had become frequent. This practice has been since matured into a distinct system. Under the 74th, 77th, 79th and 81st rules of equity practice prescribed by the Supreme Court, "whenever any reference of any matter is made to a master to examine and report thereon," he is authorized to "regulate all the proceedings in every hearing before him," and "examine the parties in the cause upon oath, touching all matters contained in the reference," and to examine accounting parties viva voce, or upon

interrogatories in his office, or by deposition, as he may direct. It is stated in Daniel's Chancery Practice, that such "an *examination* is in the nature of an *answer,* and not of a deposition, and is governed by nearly the same rules as answers." In the language of Chancellor Kent, "Every defendant, notwithstanding his interest, is bound to answer, in the first instance, under oath, to the charges in the bill; and, having thus answered *as a party,* it is said that he shall not be examined in chief, in the character of a mere *witness.* But when a reference is ordered *upon hearing,* then the inquiry becomes necessarily minute, and a new and more detailed investigation is opened, to which the general inquiries in the bill were not adapted. Here, the same policy and principles of the court which required an answer to the bill, apply, and call again upon the conscience of the party, *as party,* for a further disclosure adapted to the minutiæ of the inquiry. The same reasons which required an answer, in the first instance, require an examination in the second * * * * * *. The bill could not have been framed and adapted to meet the fulness and minuteness of the inquiries under the reference, and it is the fundamental doctrine of this court, that the party is bound to answer *on oath* to every fact material to the right of the plaintiff. The disclosure must be made, either by the answer to the bill, or by examination before the master. In one way or the other, the truth is to be sifted out, and the conscience of a defendant probed to its deepest recesses. The *usual* subject of a reference is the taking, and stating an account; but I apprehend, there is *no case* which *confines* the power of the court, as to the examination of parties, to that kind of reference; and the reason of the rule, and, no doubt the practice, applies to references in general." After citing precedents of orders for examining parties, and compelling the production of books and papers in different stages of equity causes, and giving an extract from the above ordinance of Lord Bacon, Chancellor Kent instanced the case before him, which was that of a party fiduciary accountable as "one of the strongest that could be imagined to illustrate the necessity of such a jurisdiction, and the wisdom of the rule," adding the

remark that "a reference, in such cases, under the usual order, has the effect of a supplemental bill of discovery." (2 Johns. Ch. 516 to 518.)

In England, the order of reference usually contains a provision that the master may examine the parties on oath concerning the matters referred, upon *interrogations as he shall direct,* and may order and compel the production of books and papers, etc. There, the master cannot examine parties without an express authority conferred by the court. But such an authority is almost always inserted in the order, as a provision of course. In cases of accountability, and other cases in which rights incidental to, or arising from, fiduciary relations are to be ascertained, or enforced, the omission of such a provision has been corrected by the allowance of an amendment on almost the same footing as if the omission had been a mere clerical mistake in drafting the order. Under the rules of the Supreme Court of the United States, the authority is, as we have seen, implied, though not inserted in the order.

Under an order of reference made by a Circuit Court of the United States, in an equity suit, the examination of a party should be conducted before the master by interrogatories in writing, if such a course is insisted upon by any of the parties interested in its result. But the interrogatories may then, according to the practice in this, and perhaps in other, circuits, be written down by the master, or for him, before each answer, as the examination proceeds. Though the examination is, in form, and in effect, a series of answers to successive interrogatories by the master, the interrogatories are, from necessity, or for convenience, proposed, and are often, without objection, directly put, by parties, through their counsel, under, of course, the master's direction and regulation. The formality of writing down the questions is often, by express agreement, or tacit acquiescence, dispensed with, except on points upon which the master or his clerk is requested specially to reduce them to writing. The relaxations in some of the States, of the rules of the English practice, in these respects, in the master's office, originated in taking the depositions of *witnesses,* and were

afterwards extended, perhaps rather incautiously, to examinations of *parties,* where an adherence to strict rule is obviously more important. But, if no objection is taken in the course of the proceedings, the question, under each head, is considered one of mere convenience involving no principle of policy or of right. (See Livingston *v.* Story, 13 Peters, 367, 368; Remsen *v.* Remsen, 2 Johns. Ch. 499.) When an authority to examine parties is conferred by an order of this Court, the direction that it shall take place *upon interrogatories,* therefore is usually omitted, in order that the parties may dispense with written interrogatories if they prefer this informal mode of proceeding. But where such interrogatories are thus waived, the character of the proceeding before the master under which a party is examined still is that of an *answer* as distinguished from a deposition.

In Smith's Chancery Practice, it is, without the citation of an authority, said of "the examination of a party in the cause sworn in answer to interrogatories settled by the master" that "such examination is only evidence against the examinant, and can neither be used in his favor, nor against another party." That it cannot be used against another party is, undoubtedly correct if the examination is considered not as a deposition, but as an answer. The other proposition that it cannot be used in the examinant's own favor, may be true when the interrogatories have not been framed or suggested by an opposing litigant. But when they have been prepared and submitted on behalf of such an opponent, the circumstances that the master has allowed them to be put, as framed, ought not, according to what seems to be the meaning of the Practical Register (Wyatt, 198,) to prevent the examinant's answers, when responsive to them, from being evidence in his own favor. The same inference is deducible from the 70th of Lord Bacon's ordinances which has already been cited. The safer and more just rule would seem to be to receive his answers as evidence in his own favor under the same limitations which apply to his answer to the original bill. It is true that in cases of accountability, where such examinations occur more frequently than in

other cases, an allegation by which the accountable party, in response to an interrogatory or adverse allegation, charges himself with an item, cannot in general be so framed that the context shall operate in avoidance of the charge, or by way of discharge. But this rule applies not less to his answer to the original bill than to his answers when under examination by a master who is taking an account in pursuance of a decree. (See 2 Johns. Ch. pp. 87 to 94; 11 Howard, 140, 141.) The rule depends upon the particular proposition that the matter stated in discharge or avoidance, when it is not otherwise responsive to the allegation, or question of accountability, cannot be made so by a mere form of words connecting it, in a single sentence, with the admission of the truth of this allegation. The general analogy of the examination to an answer is, therefore, here maintained.

There is no particular state of a suit in equity, after answer, in which such an order of reference with a power to examine parties may not be made. When, before the replication, a cause is heard on bill and answer, upon motion or otherwise, an interlocutory decree may always direct such investigations as justice and equity may require. The investigation is usually directed, because points have been discerned upon which fuller information than the answer has disclosed is required. The necessity for a reference may arise, as in the present case, from the fact that an answer has been evasive or suppressive, in particulars as to which the relations of the parties had required from the respondent a full disclosure. The summary examination by the master may then be the principal purpose of the reference.

A proceeding under which a receiver is appointed, is usually of a summary character. It would often be an idle form, if the disclosure of such material facts concerning the subjects of his intended custody as the answer may have suppressed, were not summarily compellable through such an examination. The necessity for it could not be stronger in any case than it was in the present, where the obscurity of the defendants' answer, as to their conduct and intentions, afforded sufficient reason

for taking the funds out of their hands and placing them in less insecure custody. Discovery, not less than security, was the purpose to be attained.

That these purposes might, as far as possible, be attained, the following interlocutory decree was made:

"15th October, 1851. This cause having been heard on the motion of the complainants for a receiver, it is ordered that it be referred to Thomas I. Wharton, Esq., as a master, to take an account of what gold dust, gold, and other securities, have been shipped from time to time, whether already received, or yet in course of transportation, by the said S. Beebee Ludlow and Company, of San Francisco, or by their authorized agents, to the said defendants, or to their authorized agents, or to any other person or persons, for the object and purpose set forth in the bill, of providing for the drafts drawn by the said S. Beebee Ludlow and Company upon the said defendants, and by them accepted, and of which said drafts, certain are held by the complainants, and upon certain others of which the said complainants, or some of them, are liable as endorsers.

"And that he report to the court the disposal which has been made by the said defendants, or on their behalf, or for or in their name, or otherwise howsoever or by whomsoever, of the gold dust, and gold and other securities; and particularly when, and into whose hands, the various alleged remittances of the said gold dust, gold, and other securities, already arrived, did come. And if any part or portion of the same has been seized or appropriated by creditors by attachment, or by any other persons by attachment, or otherwise, to report all pertinent facts relating to such seizures and appropriations of the said securities; and more especially to report who such alleged creditors or other persons are, and what the amount of their claims or rights in the said securities may be; and what the amounts are of the said securities which have been so seized or appropriated by them respectively; and what the existing condition may be of such attachments, seizures, and appropriations, of the said securities.

"And for the better taking the said accounts, and discovery

of the said matters, the master is authorized to take testimony, and to examine the said parties touching the said matters, and to compel the production of books, papers and vouchers.

"And it is further ordered that the master do appoint a proper person to be receiver of the said gold dust, gold, and other securities, such person first giving security, to be allowed by the master, faithfully to perform his duties as such receiver."

Under this order, the master, on 22d October, 1851, appointed a receiver, who gave the required security, and whose appointment was approved by the court. The bill of exchange for $6,000, which composed a part of the remittance that arrived on the 18th of October, had in the meantime been accepted. The receiver obtained it from the defendants, and collected its amount at maturity. It was paid on the 22d of November.

He also received from them a bill, at 30 days' sight, for $8,000, which constituted the remittance that arrived on the 7th of November. This was a bill of Burgoyne & Co., on Beebee & Co., in favor of S. B. Ludlow, endorsed by him to the defendants, and by them endorsed in blank. The receiver deposited this bill with a bank in Philadelphia for collection. It was presented at New York to Beebee & Co., by whom it was accepted. This acceptance was a virtual admission by Beebee & Co. of the invalidity of the transfers by the defendants, under which Beebee & Co. had appropriated the three previous remittances to their own use. Their acceptance of the bill was doubtless to prevent its return, under protest, to the drawers in California.

Had Beebee & Co. been unable to prevent such a return to the same drawers, by the mail of 15th September, of their bills for $6,000, then under protest, those bills would probably have been taken up, and their bills for $20,000, which arrived in the beginning of October, would probably have been accepted and paid.*

* See p. 139.

The bill for $8,000 was paid at its maturity to the receiver.

This completes the history of S. B. Ludlow's remittances to the defendants. Besides the remittances whose proceeds had been credited in the general account, ending in the balance due to them of $21,622.67, and besides the $10,692.44, said to have remained under attachment, his remittances had produced the net amount of $81,924.40, which was an excess of $60,301.73 above the balance due to them in general account. This excess was composed of the net amount of $46,301.73, which had remained in the hands of Beebee & Co., bearing interest from a day not later than that on which the bill was filed,* and the $14,000 which, with its increase, remains in the custody of the receiver.

If the present proceeding had been at the suit of S. B. Ludlow, he could not have compelled the payment of these amounts to himself, without first exonerating the defendants from liability for his drafts upon them, by discharging the drafts from other sources. But, the defendants would, in such a proceeding, have been compellable to pay to holders of these drafts, an amount equal to the $46,301.73, with its interest; and the $14,000, with its increase, would have also been distributable, under the direction of the court, among these draft holders. Payment of the $46,301.73, with interest, into the registry of the court, or to the receiver, would probably have been ordered, that it might, with the $14,000 and its increase already in court, form a common fund for distribution. In the distribution of this fund, cognizance would have been taken of such equities as, from the detention of other portions of the remittances under attachments at the suit of particular draft holders, might have arisen in favor of draft holders not privy to the attachments. Cognizance might also have been taken of the question of the defendants' liability for the deficiency, if any, of the fund for distribution, to equalize the receipts of non-attaching and attaching draft holders.

* See p. 159.

The principal question for the consideration of the Court has been, whether, in the present proceeding, at the suit of the draft holders themselves, they can obtain the like relief, under any independent equity of their own, or under any derivative right acquired through equities of the defendants and S. B. Ludlow. Another question has been, whether, against the draft holders, the defendants had the same right which they would have had against S. B. Ludlow, of retaining or disposing, for their own use, of his remittances to the value of the $21,622.67, due to themselves.

The manner in which these questions have been presented will appear from the following history of the litigation since the appointment of the master on 15th October, 1851.

Besides the documentary evidence produced before him, and reported by him to the court, he examined the defendant, Robert M. Ludlow, and took the deposition of William Taylor as a witness. A commission to New York was issued, in pursuance of which, depositions of the two Messrs. Beebee, severally taken, were forwarded to the master "to be received by" him "and by the court when reported to the court by" him, "as part of the proceedings in" his "office." These two depositions, and the documents returned with them, are the most important evidence in the cause, except the accounts between the defendants and S. B. Ludlow, and his letters to the defendants and to Beebee & Co. which accompanied his remittances.

S. B. Ludlow, at the request of parties on both sides, left California on or about the 1st of November, 1851, and came to Philadelphia, where he arrived in the beginning of December, and remained nearly, if not quite, five months, during which time he was more than once examined before the master as a witness on the part of the complainants. In some letters written by him from Philadelphia, he expressed his disapproval of the transfer by the defendants of his funds to Beebee & Co. There is no proof that he ever, in any manner, signified, in writing, or by word of mouth, any disapproval

of the appropriation of his remittances for the security of the draft holders by the writing of 1st September, 1851, or signified a desire to recall anything in his letter of 14th October, 1851, by which it was ratified.

In the early part of February, 1852, many of the draft holders by whom and on whose behalf the present suit is prosecuted, instituted several actions by foreign attachment against Beebee & Co., the New York house in whose hands the misapplied funds remained. These were actions of indebtitatus assumpsit for money had and received, with other common counts. They were brought for a recovery, by the respective plaintiffs, from Beebee & Co., of a dividend, in each case, of the proceeds of the remittances in question which had remained in their hands. Other actions of the same kind by foreign attachment were instituted simultaneously, for the same purpose, at the suit of S. B. Ludlow, as nominal plaintiff, to the use of some of the respective draft holders who also brought suit as above in their own respective names. His letter of 14th October, 1851, was a sufficient authority to use his name in a proceeding for their use if he could himself have maintained the proceeding. Beebee & Co. contested the respective suits of both descriptions, either by entering bail to dissolve the attachments, or by otherwise appearing for the purpose of contestation, according to the provisions of the law of the State.

In one of the cases in which suit was thus brought in the State Courts, in the name of draft holders as plaintiffs, a commission to take the testimony of witnesses at San Francisco was issued. By a memorandum appended to the commission, it was agreed that the return to it, "subject to all legal exception," should "be used and read in evidence" in each of the other cases in the State Courts, *and also in this cause,* "as if the commission had been issued and the depositions had been taken" therein, so that no objection which would not have been available to the party making it, had the commission been issued and executed therein, should be admitted. Under this commission, the complainant Gabriel Winter, his brother Clinton Winter, Robert H. Bennett, and Benjamin F. Hillard an

endorser of some of the notes held by the complainant Hopkins, were examined as witnesses. The depositions of the first and last named of these four witnesses were properly rejected, and those of Clinton Winter and R. H. Bennett rightly received by the master.

While the reference was pending, the complainants, on 31st May, 1853, in consequence of a proceeding on the part of the defendants under the 66th rule of equity practice, filed the general replication.

In September, 1853, the reference being still pending, counsel on behalf of the defendants were heard in support of an application that the court would determine whether the testimony taken before the master, and his report, were "to be considered evidence to be used upon the final hearing of the cause, or" merely testimony under "an interlocutory order relating to the action of the receiver, or what other effect" should be given to the proceedings under the reference. The court refused to determine the question upon this application.

It was afterwards, before the master, "agreed by the counsel on both sides that he should report to the court the testimony taken merely, and *without making any other report.*" He reported this agreement, and the testimony which had been taken composed of the documentary evidence, the depositions of Clinton Winter, R. H. Bennett, G. W. Beebee, S. J. Beebee, S. B. Ludlow, and William Taylor, and the examination of the defendant, Robert M. Ludlow.

This report of the master was filed on 10th October, 1855. To some other details of his proceedings, exceptions were filed, but they were afterwards dismissed. No exception was taken on either side to his report of the agreement on the subject of the testimony.

The parties on both sides appear to have been desirous that a decision of the suits in the courts of the State should precede the final hearing of the present cause.

An insuperable difficulty opposed to a recovery in those courts by the draft holders who had sued in their own respect-

ive names, was in the doctrine already mentioned that the liability of a party to be made a defendant in an action *at law, sounding in contract,* cannot by a transfer or appropriation to which he has not expressly assented, be divided "into many causes of action in favor of different parties," with whom, respectively, he was not in original privity.* We have seen that in a court of equity this difficulty does not exist, or is avoided by the course of its practice.† In Aycinena *v.* Peries, 6 Watts & Serg. 243, 256 to 258, 2 Barr, 286, there was an original privity of interest in the plaintiff which had been recognized in the act under which the defendant had obtained the fund in which the plaintiff had a partial interest. The action was therefore maintained on the same footing as if it had been a bill in equity. But, when there is no such original privity, the course of chancery practice in this respect has never been adopted in the mixed system of law and equity under which the administration of justice was formerly regulated, and still is, to a great extent, regulated in Pennsylvania. (See 4 Watts, 410; 1 Wharton, 402, 407, 408; 7 Watts & Serg. 30; 2 Casey, 90.) In the present instance, the parties who sued in the courts of the State might, perhaps, have avoided *this* particular difficulty, by bringing a *single* action for their common use, in the name of S. B. Ludlow as plaintiff. But the suits in his name, *severally brought*, as they were, could not, in their multiplicate form, have been sustained, if no other difficulty had stood in their way.

Most of the suits which had been thus instituted by attachment were in the Supreme Court of the State. One of them was tried in the Court of Nisi Prius in January, 1855, before Lowrie, J., by whom the plaintiff was nonsuited. Another of the cases was tried in March, 1855, before Lewis, C. J. This, as well as the case before Judge Lowrie, was an action at the suit of a draft holder in his own name. The two cases, in the opinion of Chief Justice Lewis, did not materially differ. He rejected the evidence offered by the plaintiff to prove an appro-

* Ante, pp. 54, 55, and the note at foot.
† Ante, pp. 55, 56, 72, 73.

priation of the remittances in his favor. The letter of 14th of October, 1851, from S. B. Ludlow to the defendants was a part of the evidence thus offered. But, as Beebee & Co. were not privy to it, and its date was after the last receipt of money by them, it could not affect them so as to avail the plaintiff. The assignment of the defendants, dated 1st September, 1851, was *not* included in the offer. The deposition of William Taylor, proving it, and containing a copy of it, had been taken in the cause, and was on file. It is among the papers afterwards certified with the record to the court in banc. But it is *not* certified as a part of the *evidence offered* at the trial, nor was there any offer of it in evidence. The evidence offered proved sufficiently that the remittances had been appropriated for the security of Ludlow & Co. as intended acceptors of the remitter's drafts. But under a distinction which has been stated, and fully developed,* there was no evidence of such an appropriation for the security of the drafts themselves as could avail their holders. The Chief Justice thought that the evidence offered did not tend to prove any such appropriation as would enable the plaintiff to maintain the action; and remarked that there was no privity of contract between the parties to the suit, and that the contract of Beebee & Co. with Ludlow & Co. or with S. B. Ludlow, could not be split up, against their consent, into many causes of action in favor of different parties. The verdict was for the defendants, in whose favor judgment was rendered. The record, with a bill of exceptions, having been certified to the court in banc, judgment for the defendants was rendered there, after argument, on 22d May, 1856. The case is reported in 2 Casey, 86. The opinion of the court was delivered by Black, J.

Against Beebee & Co., as defendants, in that case, their own depositions, as witnesses, taken in this case, and the papers annexed, if read in evidence as their *admissions,* might, in connection with other evidence that could have been adduced, have proved such a fraud on their part as would, perhaps, have ren-

* Pages 55 to 68.

dered them liable in damages, if the proceeding had been one of a different character. These depositions were not offered in evidence; and there was, perhaps, no sufficient evidence to have sustained a proceeding of any kind on the distinct ground of fraud. But this inquiry could not have been raised in an action of indebtitatus assumpsit, or in any form of action which *could* have been commenced by process of *foreign attachment*. The court in banc appear to have been of opinion that, if the transfer of the remittances had been made and received "for the fraudulent purpose of cheating" the draft holders, one of them could have maintained an action upon the case, in the form of tort, against Beebee & Co., but that "no proof of such fraudulent conspiracy between" them and "Ludlow & Co." would sustain "assumpsit." The judgment was rendered in the court in banc, as well on this ground as on the grounds upon which the decision had been rested in the Court of Nisi Prius.

Immediately after the verdict in March, 1855, others of the cases which had been instituted by attachment were, in succession, reached upon the trial list. In each of these cases, there was an entry of a non-suit, which was to be taken off if the opinion of the court in banc, in the cause that had been tried, should be in favor of the plaintiffs. After the adverse opinion of the court in banc, the plaintiffs, in one or more of these other suits, made a motion that the judgment of non-suit be taken off. This motion was overruled on 28th March, 1857, after which the plaintiffs appear to have again turned their attention to the proceedings in this Court, which had, in the meantime, been suspended.

When the cause afterwards came to be heard in this court, the principal evidence was that which had been taken in the master's office, and returned with his report. Notwithstanding the above mentioned agreement of the parties that he should report the testimony taken before him to the Court, the defendants objected, at the hearing, that the order of reference did not authorize an examination of parties or witnesses for any purpose other than that of ascertaining the proper subjects

by the receiver whom the master was to appoint, and that the depositions and examinations taken for this special purpose were, consequently, not proper evidence for the general purposes of the cause.

To the depositions of the witnesses, Bennett and Clinton Winter, taken under the commission to California, this objection could not apply. The above mentioned agreement as to the return to this commission, made before that reported by the master, certainly rendered these depositions admissible in any stage of the cause. An independent subsequent agreement had also been made that no objection should be taken to the proof of the handwriting of letters annexed to the return of this commission, having been made by persons who might not be competent witnesses, the letters being subject, of course, to all other exceptions.

The objection was confined, therefore, to the other documentary evidence, and other depositions, and Robert M. Ludlow's examination.

The purpose of the order of reference, according to its proper interpretation, was not restricted within the narrow limits assigned to it by the argument in support of the objection. The hearing at which the order was made, though occurring upon the occasion of a motion for the appointment of a receiver, was not, for this reason, the less an interlocutory *hearing of the cause upon bill and answer,* when any interlocutory decree, proper in that stage of the cause, might have been made. After answer filed, and before or after the replication, a court of equity may make an interlocutory decree for an account, or for any other investigation which may be prosecuted while other parts of the litigation are either pending or suspended. The purposes of the interlocutory order in question were not, on its face, limited to those of the receivership. The necessity for the order arose, as has been stated, in part from the contents of the defendants' answer, but much more from its omissions. The question referred was not whether a receiver was to be appointed, or, if appointed, was to retain his office. He was already, in effect, appointed, because his appointment was *abso-*

lutely ordered, the duties of the master being in this respect limited to the selection of the person and regulation of the security. The receiver's custody was to be that of the court. The purposes of the ulterior investigations by the master, under the order, were not only to ascertain the particulars composing the remittances thus to be taken into the charge of the court, and their amount or value, but also to investigate their title, in order to ascertain the truth as to their alleged appropriation, general or special, for the security of the billholders. If the agreement which is now under consideration had not been interposed before the master, he might have so reported upon the several points of the reference, that his report, if confirmed, would afterwards have been properly recurred to in every stage of the cause. It might, perhaps, have alone constituted the proper basis of a final decree. It would, at all events, have been evidence at the final hearing, to prove any such relevant facts as he might, in pursuance of the reference, have reported. Even upon the trial of *another* cause, at law or in equity, involving the same subjects of inquiry between the same parties, or between privies in interest, such a report would, for and against the opposing litigants, have been evidence of any such facts. This is proved by the decision and reasoning in Hopkins *v.* Lee, 6 Wheaton, 109, 116, and by the course of reasoning in Lloyd *v.* Johnes, 9 Vesey, 54 to 60. The report could not have had *less* effect at a hearing of the original cause, of whose proceedings it would have been a part. Now, the testimony in question was an *agreed substitute* for such a report as, if made, would have had this effect. The testimony cannot, under the agreement, have been intended to have *less* effect than would have been attributable to the report which the agreement prevented from being made. Whatever facts would have been properly deducible from the testimony by the master for insertion in his report, might, therefore, under the agreement, be deducible from it by the court for all the purposes of the cause.

Had the purpose of the order of reference been restricted to the question of *custody alone,* the result for which the de-

fendants contended under this head would not have ensued. However limited the *purpose* of the intended investigation, the *subjects* of it were precisely defined in the order. They were subjects of probable investigation at the final hearing. However material they may have been to the question of custody, or to whatever question was referred, they were not, for this reason, to be less material in ulterior stages of the cause. Had the master made his report upon the points referred, and returned the depositions with it, and had his return of them been sanctioned by the court's approval, many cases collected in books on Chancery practice indicate that, upon an exhibition of sufficient cause for an order that these depositions be read at the subsequent hearing, the court would, on an application of either party, have made such an order. An order of this kind may be made in Chancery where, without it, the depositions could not be read even upon proof of the death or absence of the witnesses, and in some cases where, upon proof of the death of the witnesses, their depositions could not be read upon a trial at law between the same parties. Whether the present case would have been a proper one for such an order as to these depositions, or whether, under the form of the reference to the master, the depositions might not have been read without such an order, though there had been no agreement of parties on the subject, are questions which the agreement reported by the master prevents from arising. The agreement was both a dispensation with, and an equivalent for, such an order of the court. It, in effect, was an agreement placing the depositions upon the same footing as if the master had been a commissioner appointed after a replication. This effect of the agreement becomes obvious when we consider that the parties having, by its terms, dispensed with a report of the master on the points referred, there was to be no stage of the cause *anterior* to the final hearing at which it *could* operate for any useful purpose. The parties cannot have intended that their agreement should be practically ineffectual, as it would have been if these depositions could not have been used at the final hearing.

William Taylor and S. B. Ludlow, whose depositions have been reported by the master under this agreement, are, however, witnesses who stand in relations to the cause which are peculiar. William Taylor, after his deposition had been taken, was made a party defendant in an amended bill, in which the paper of 1st September, 1851, purporting to assign the remittances to him, was fully set forth. Judgment against him that the bill be taken as confessed was afterwards rendered. This judgment was prior to the agreement of parties before the master, and to his return, under it, of the testimony. As to S. B. Ludlow, the want of whom as a party constitutes a difficulty of the case, it will be considered as if proceedings to make him a party had been instituted.

According to the practice of courts of equity, no party can be examined as a witness without a specific order upon an application for the purpose. If it appears distinctly that no beneficial interest of the proposed witness can be affected by any future decree in the cause, the order may be absolute. *After* hearing, the order is usually refused unless it can be thus made absolutely. (3 Johns. Ch. 612.) But *before* hearing, the usual course is to grant leave to take the deposition "saving all just exceptions." (2 Ves. & B. 401, 405; Ambler, 583, 584.) If, when the hearing comes on, the deposition should be adjudged inadmissible, it can, in the language of Chancellor Kent, "be entirely and safely suppressed." (3 Johns. Ch. 614.) It is thus inadmissible if any beneficial interest of the deponent can be affected by any future decree. Many cases might be cited confirmatory of the following statement made by Lord Redesdale, when at the bar: "There cannot be an adverse decree against a party whom plaintiff has examined as a witness. But, it is the continual practice to examine trustees, etc., as witnesses, and to have a decree against them specifically to do the very thing they prove is to be done. A man *cannot be examined* for his own interest, or *against it*, because there cannot be a decree for or *against* him, upon his own evidence." (1 Ves. Jr. 420.) According to the cases in Ambler, 583, 584, and 2 Ves. & B. 401, 406, a party, though interested in the

result of the cause, may be examined upon the points of it as to which he is not interested at the time of his examination. Though he should afterwards become interested in the subject of his examination, the subsequently acquired interest will not afford a reason for suppressing his deposition on those points. (See 1 P. Wms. 288; 2 Atk. 615; 2 Ves. Sen. 43.)

We have seen that the authority of the defendants, as agents of S. B. Ludlow, could not be delegated, and that they were incapable of creating, without his assent, such a trust in another person as the paper of 1st September, 1851, defined. As his ratification of that paper was not known at Philadelphia till about the 20th of November, 1851, after the misappropriation of the funds had been completed, William Taylor could not, without aid from the defendants, have prevented the misappropriation. As, therefore, no decree charging William Taylor personally can be made in the cause, his deposition is that of a person examined as a witness, and *afterwards made a party* in respect of an interest or liability not his own. Whether he stands in the position of a trustee having the legal interest, or not, his deposition, according to the decision of Cope *v.* Barry, 2 Jacob & Walker, 538, 539, is evidence at the hearing. It is not necessary, therefore, to inquire whether his deposition might not, at all events, have been read under the agreement reported by the master.

S. B. Ludlow's deposition is liable to the two-fold objection of his interest entitling him to protection when he may be made a party, and his interest as a witness entitling the original defendants to protection. But, so far as an appropriation by him of the remittances in question could have been effectual, they must have been *his own*. Upon the question whether they had or had not been appropriated for the security of a debt of his own, his interest was, therefore, balanced. Upon this point his testimony might perhaps be read. But the separation of the inadmissible portions of it would be very difficult. Against himself, it could not be read as proving his own liability to others for amounts which the complainants allege to have been payable out of the proceeds of the remittances. Against the

original defendants, it cannot be read as proof that he made the remittances, or as proof of their amount or value.

The examination of the defendant, Robert M. Ludlow, not as a witness, but as a party, requires consideration. We have seen that it is not a *deposition;* and we may add that it is not an extrajudicial admission. The latter proposition is proved by the rule above stated that a deposition of a party against his own interest will, at his instance, be suppressed. As an *extra-judicial* admission, the examination of a party cannot stand upon any other footing than a deposition. The examination of this defendant can be used against him, therefore, only as a *judicial* admission, or species of *answer*. To its use by the complainants, in the proper mode, under this character of an *answer,* the examinant cannot, on his own behalf, object. His examination was informally and, perhaps, in some particulars, irregularly conducted. But he was attended by his counsel and solicitor who could have objected before the master to such irregularities as might have been thought material, or could have obtained the court's interposition if an application for the purpose had been thought necessary. The examination having been engrossed, subscribed, and returned, without exception, may be read at the hearing, in the form in which it is presented.

But its effect as against his co-defendant, R. McKinney Ludlow, must be determined, before it can be considered for any of the purposes of the cause, as no decree can be made against one alone of these two parties. The two defendants have jointly answered. But their answers to the original bill, and to an amended bill, have been sworn by Robert M. Ludlow, the examinant, alone. Their answers to some subsequent amendments of the bill are not sworn to by either defendant. An unsworn answer, when the complainant proceeds without requiring that it be sworn, puts him to the proof of such averments of his bill as the answer does not admit. But it is not evidence, as a sworn answer is, in favor of the defendant, in support of his own responsive allegations. Against allegations of an unsworn answer, though they may be responsive to the bill, the

complainant may prove his case by the testimony of a single uncorroborated witness, however insufficient such proof might have been against a sworn answer. (5 Peters, 111, 112.) In this case, the effect of Robert M. Ludlow's oath to the answer of these defendants, which is the only oath in support of it, is, on certain points, destroyed, or neutralized, by his examination before the master. For the purpose of thus destroying or neutralizing the effect of their answer, this examination must operate against both defendants alike, if the examinant's previous oath to their answer would otherwise have rendered it in favor of his co-defendant, a sworn answer. In other words, unless the examination operates thus against R. McKinney Ludlow, *he* must be regarded as a defendant whose answer is unsworn.

Beyond this, if these defendants had not been copartners in the transactions to which Robert M. Ludlow's examination relates, it could not operate against R. McKinney Ludlow, who has neither been examined, nor adopted this examination as his own. A regular answer of a defendant in a cause, cannot be read or used against his co-defendant. (2 Wheaton, 383; 3 P. Wms. 310 to 312; 12 Ves. 361, 362; 7 Price, 193, 203.) An examination before a master cannot, on this point, stand on any footing more favorable to its reception as evidence against a co-defendant.

But the question of the admissibility of the examination of a defendant as evidence against a co-defendant, as to transactions in which they were *partners,* is different. In England, such an examination is received in the Court of Chancery, as evidence against a former co-partner. (See Pritchard *v.* Draper, 1 Russ. & Mylne, 191, affirming Tamlyn 332, so far as this point was concerned; and see 2 Bingh. 306.) In Van Reimsdyk *v.* Kane, (1 Gallison, 635, 636,) this rule was acted upon, as to an answer, in the first judicial circuit; and, on appeal to the Supreme Court, though not thus acted upon, was conceded to exist. (9 Cranch, 156.) It must, therefore, be considered as a rule established for the direction of this court. Under it, the examination in question is evidence against both defendants.

But, the examination of Robert M. Ludlow, and the depositions of William Taylor and S. B. Ludlow, might be expunged from the case entirely, without any change in its result. They have respectively been quoted, whenever they have been looked at for any purpose, in the foregoing report of the facts. All the material facts of the case are proved sufficiently by the correspondence, accounts, and other papers in evidence, the two California depositions which are unobjectionable, the New York depositions, and the defendants' joint admissions in their original answers. The facts reported, except so far as conceded at the hearing, have been deduced from these materials.

Upon these facts, if the case were decided between the complainants and the original defendants, it would be referred to a master for an account and a statement of distribution according to the principles which have been applied in the preceding parts of this opinion. The master, of course, would supply such omissions, and correct such errors of amounts, and of calculations, as may have occurred in the foregoing statements and estimates. His duty would be exercisable under three heads. Under the first he would report an account of the net avails of all of S. B. Ludlow's remittances, credited, as above, by Beebee & Co. to the defendants, but not credited by the defendants in the account annexed to their answer. The account of the bullion, under this head, should be separated from that of the bills no farther than may be necessary for placing the deduction mentioned below to the proper account. The first item of proceeds of bullion would be $14,115.66, credited on 5th September, 1851, to which interest should be added to the 19th of that month, when the next credit, $10,471.43, should be added. From the sum of these amounts, the balance, $21,622.67, due to the defendants in cash on the 25th August, 1851, with interest to 19th September, 1851, should be deducted. The difference, bearing interest from 19th September, 1851, would represent the first item from avails of bullion, in which the draft holders were interested under the paper of 1st September, 1851. The subsequent amounts of proceeds of bullion, with interest

from the respective dates of the credits in Beebee & Co.'s account, should, unless new evidence is introduced, be taken from that account, and from G. W. Beebee's deposition. The freights, insurances, and other charges in that account should be allowed, with such additions or deductions, if any, as might be proved. The credits for the proceeds of bills, beginning with $6,000 credited on 10th September, 1851, with interest respectively, would probably be subject to no particular deductions of charges; but this point would be open to inquiry before the master. The result of this account of the bills and bullion would be an amount which has been estimated above as $46,301.73,* more or less, with interest from a day not later than 7th October, 1851, the date of the last item. From the precise amount, when ascertained, should be deducted such part of the charges for services of counsel, paid or incurred by the defendants before August, 1858, as the master may deem a reasonable allowance to them, for the expense of defending themselves against the complainants' attempts to deprive them of the allowance of a credit for the balance of $21,622.67.

Under the second head, the master would, if either party should request it, report the disposition that was made of the residue of the remittances which arrived after August, 1851. They appear to have been composed exclusively of bullion, of which the invoiced values are given. If the defendants had not violated their duty as agents, they would have been in funds, after discharging the balance due to themselves, to prosecute the necessary measures for the reclamation of this bullion. The burden is on them of showing what became of it; what portions, if any, were attached, how, where, and at the suit of whom; what proceedings occurred under the attachments, and what measures, if any, were adopted or prosecuted by themselves, or by any, and what other person or persons, to contest or defend such attachments, and with what results.

Under the third head, the master would report a schedule of the drafts which are secured under the appropriation of 1st

* Page 159, and see p. 174.

September, 1851, and the distribution to be made, among their holders, of a fund which would be composed of the amount payable by the defendants upon the result of the account stated under the first head, the additional amount, if any, chargeable against them upon the result of the investigation under the second head, and the $14,000, with its increase in the custody of the receiver.

The master would be at liberty to report separately under each of the three heads. The amount due by the defendants under the first head may be readily ascertainable. If it should be ascertained before the proper time for an order of distribution, a decree that the defendants pay it into court, or to the receiver, might be made pending the investigation under the other heads.

SUPPLEMENTAL OPINION, 11TH JULY, 1859.

Upon one point, there has been a partial want of perfect concurrence on the bench. The judges concur in opinion that the defendants are entitled to a credit in account for such portion of their charges, paid, or incurred, for the services of counsel rendered before August, 1858, as may afford a reasonable compensation for defending them against the complainants' attempts to deprive them of the allowance of a credit for the balance due to them in general account at the time of their failure. Beyond this portion of their charges for professional aid, the district judge thinks that no credit of charges for such aid should be allowed them in account. He also thinks that no part of any allowance that may be proper under this head should be paid out of the fund in the custody of the receiver. His reason for this opinion is, that the balance due to the defendants had, before the present suit was instituted, been reimbursed out of the proceeds of the previous remittances, of which the defendants improperly transferred the surplus to Beebee & Co. If the defendants had not misappropriated that surplus, it would have been in the receiver's hands, as the proper fund for the payment of these charges. The district judge thinks that the proceeds of subsequent remittances in

the receiver's hands are exempt from liability to such charges. The former opinion prepared by him, in defining the purposes of such a reference for an account and report of distribution as will be required for the final disposition of the cause, contained, therefore, a remark that this allowance was to be deducted from the amount of the defendant's accountability for the misapplied surplus of the previous remittances.

The circuit judge is, however, of opinion that the litigation has been protracted from causes which make the question depend upon peculiar considerations. He thinks that the unusual frequency of the amendments of the pleadings on the part of the complainants, for which applications were unseasonably made, at and after the stage of the cause which ought properly to have been a final hearing, has cast upon the defendants' counsel an extraordinary amount of labor on multiplied occasions of attendance in court. He takes into view the circumstance that the fund in the receiver's hands has, under previous orders of court, made apparently without objection, already borne heavy charges, including the costs of the former reference, etc., which, as current expenses of the suit, would otherwise have been primarily payable by the complainants. He moreover takes into consideration the circumstance that the litigation is to be still further protracted under proceedings to bring in a new party, and that the measures heretofore adopted for the purpose by the complainants have been irregular, so as to require a recommencement hereafter of the suit which has been pending for almost eight years. He thinks that, under such circumstances, particularly as the case was begun with an admission of insolvency in the pleadings, the fund in court is properly chargeable, under this head, with the payment of $1,000 to the counsel of the defendants.

The district judge did not become a member of the court until the cause had been set down for a reargument after what might have been a final hearing. The duty of preparing the subsequent opinions of the court having devolved upon him, he is gratified that his views upon the other questions in the cause are unreservedly concurred in by the circuit judge. In

prior stages of the proceedings, the circuit judge has had the means of weighing practically the considerations which now influence his judgment on the point of partial difference of opinion. On this point, the district judge, having had no such advantage, thinks it his duty not to withhold his assent from an order, which will therefore be made conformably to the opinion of the circuit judge, that $1,000 be paid to the defendants' counsel out of the fund in the receiver's hands, and that an additional credit of $500 be allowed to the defendants by the master, as a deduction under this head from the amount of their personal accountability. But it is to be understood that if this order be thus made on the application of the present parties defendant, they waive any objection to a *present* reference to a master for an account, and for a report of distribution, conformably to the opinion of the court, of the fund in the receiver's hands, as well as the surplus of the proceeds of the previous remittances. The order of reference will, in that case, contain a provision saving S. B. Ludlow's rights. He will not be concluded or prejudiced by anything in the proceedings which he may afterwards properly contest; and no *final* disposition of the fund in the custody of the court will be made until he shall have had an opportunity for contestation.

AND NOW, 11th July, 1859, this cause having stood over upon the objection of the want of S. B. Ludlow as a party, the following decree is made, saving his rights:

It is considered and adjudged that the writing dated 1st September, 1851, of which a copy is annexed to the answer of the original defendants, is in force against them; that the net avails of S. B. Ludlow's remittances to them arrived before its date, but not then credited in account, and of his remittances which afterwards arrived, were, to the extent required, applicable in the first instance to the discharge of the balance of $21,622.67, due to them in general account, with interest; and that they are accountable to the draft holders who are secured by the said writing for the surplus of the net avails or value of such of his remittances as arrived after its date, with interest.

The cause is referred to Aubrey H. Smith, Esquire, as master, to report the amount for which the original defendants are thus accountable to the said draft holders, under the several heads which are specified in the opinion of the court filed of record, and according to the principles therein stated; and also to ascertain and report, without prejudice so far as the said S. B. Ludlow may be concerned, the distribution to and among the said draft holders, which under the trusts of the said writing, according to the opinion aforesaid, should be made of the amount of the defendants' accountability aforesaid, and of the funds in the custody of the receiver heretofore appointed by the court.

It is also ordered that the receiver, from the funds now in his hands, pay to D. W. C. Morris and L. Myers, Esquires, one thousand dollars allowed for their services as counsel of the accountants, as is in the said opinion stated; and that the master allow to the said original defendants, in the account which is to be reported by him as aforesaid, a credit for the additional amount of five hundred dollars, as is also in the said opinion stated.

FINAL DECREE, 1 MAY, 1861.

This cause having been heard upon exceptions to the Master's Report, and argued by counsel, the Court is of opinion that the exceptions on behalf of Hardy & Brothers are not sustainable, and overrule and dismiss the same.

As to the exceptions on behalf of the complainants Winter, Latimer & Co., it appeared, by the bill book of the defendants Ludlow & Co. and other proofs, that the draft for $2,500, due on 17th September, 1851, had been received by the said Ludlow & Co. from S. Beebee Ludlow before the end of April, 1851, and had remained in their possession until after their failure, and had never been parted with or appropriated otherwise than for the benefit of the draft holders in whose favor the master has reported distribution—the Court is of opinion that although this draft was not appropriated by the writing of 1st September, 1851, for the purposes therein expressed,

it was, nevertheless, appropriated by S. Beebee Ludlow's letter of 14th October, 1851, for the purposes therein stated, and that the complainants cannot, in equity and good conscience, receive a dividend from the fund in Court without bringing the amount of this draft into the common fund as an addition to the amount for distribution. The Court is, therefore, of opinion that the result at which the master has arrived in his report is, in this particular, correct, and confirm the said report as to the result thus attained.

The master's report is, in all other respects, approved and confirmed.

Whereupon it is considered adjudged and decreed that the receiver do forthwith distribute, pay over, and transfer from the funds and securities in his hands, to the several parties named in the master's report, the several amounts therein reported as receivable by them respectively;—and that the receiver do state and report his account of such transfers and payments, as and when completed, or monthly, or oftener, as he may deem proper, or may be required so to do, until they shall have been completed.

It is adjudged, considered, and decreed that the defendant, Robert M. Ludlow, surviving partner of the late firm of Ludlow & Co., is, moreover, accountable in the cause for the sum of $71,383.97, which includes interest to the 17th day of February last, and that he shall and do forthwith pay that amount into the registry of this Court, and that the complainants do recover from him and that he pay, the costs of the suit, and that if, and so far as, he shall fail to comply with this decree, the complainants, and other draft holders interested, shall, upon the due ascertainment of such default, have leave to proceed, as they may be advised, and as may be conformable to the practice of the Court, afainst the estate and personal representatives of R. McKinney Ludlow, the deceased partner of the said late firm, for so much of the said sum of $71,383.97 and so much of the said costs as the said Robert M. Ludlow may fail to pay.

It is ordered that any party or parties shall be at liberty to apply from time to time for further directions.

DISTRICT COURT. DECEMBER 9, 1858.

CRIMINAL LAW.

THE UNITED STATES v. BRICKER.

When the purpose and act are otherwise guilty within the statute, the similitude suffices to justify conviction if, according to the mode of use apparently designed, the counterfeit piece would have had a probable tendency to mislead persons whom it might be intended, in *this manner*, to defraud into a belief of its genuineness.

INDICTMENT for uttering and passing, as true, counterfeited coin in the resemblance or similitude of gold dollars.

STATEMENT OF THE CASE.

On the trial, before CADWALADER, J., it appeared that there had recently been manufactured gilt pieces of metal, of less weight than gold, of the size and form of gold dollars, bearing on the side called the head, a somewhat rude, but otherwise complete resemblance to the genuine gold dollar. On the reverse side, the inscription "United States of America," and words "one dollar" were omitted; but there was a wreath resembling that upon the coins issued from the mint. In some cases, loops like eyes of shirt studs, or vest buttons were in the centre of this reverse side. In other cases the disks were in pairs attached in the manner of sleeve buttons, the two heads outside. The wires connecting them when thus in pairs, and the eyes of the single pieces were very easily broken off. An imperfection at the centre of the reverse side was then apparent. When the eyes or connections were thus detached, those who dealt in them called them "pocket pieces." When connected in pairs, they were sometimes called "sleeve-buttons." The single pieces, when with eyes, were sometimes called "studs," or "buttons." Two persons who dealt in them, each concerned in business in the same store, were examined as witnesses; neither could state where, how, or by whom these articles were manufactured. These dealers bought them by the dozen, at

prices exceeding those of gilt buttons of the same size of other patterns. The same persons resold them usually without eyes, by single pieces, in pairs, or in lots of half a dozen, at prices varying from two, three, or four, to ten times the price of the ordinary gilt button. The only receptacle from which they were sold in the store of these witnesses was a box, labelled "pocket pieces." The defendant purchased some without eyes at their store on two occasions, if not oftener.

These pieces, if so presented as to exhibit the head, and elude an examination of the other side, represented the genuine dollar sufficiently to mislead persons not particularly skilled in the detection of counterfeit coin into a belief that they were genuine. It appears that the defendant, in the evening of the 28th of October last, passed a piece of this description on a tavern-keeper by laying it with its head upward on the bar, in payment for a drink, and received the change. For this he was arrested; but on the 29th of October, on a hearing before the commissioner, was discharged. About the middle of November last, he, in a similar manner passed one, and attempted to pass another such piece at two taverns in succession, on the same evening. He was arrested and searched, when two or three other such pieces, with a small amount of good money, were found upon his person.

For the defence, the principal reliance was upon the doctrine laid down in The United States *v.* Morrow, 4 Wash. C. C. R. 733, where the charge was that of "attempting to pass" a counterfeit which was a "miserable imitation of the genuine" coin, and Judge Washington said that "the jury, before they" could "convict the prisoner ought to be satisfied that the resemblance" to the genuine was "sufficiently strong to deceive persons exercising ordinary caution." This, the counsel of the defendant contended, was the statement of a rule which, when applied to the pieces in question in the present case, entitled the defendant to an acquittal.

On the part of the United States, it was answered that in the case cited no general rule as to the resemblance to the genuine coin required by the Act of Congress was laid down. The

piece in that case had not been *passed* upon the prosecutor. The question was whether there had been a guilty *attempt* to pass it. The alleged attempt had been made by the defendant, not in person, but through the alleged agency of a young child. He was not present when the child made the attempt. The guilty intention in the employment of such an agent was negatived, not in *law* but in *fact,* if the counterfeit was not such as to deceive persons exercising ordinary caution. Judge Washington, after, in effect, saying so, and saying that the piece, as it *seemed to the court,* was in all respects a miserable imitation, added, "But the jury must judge for themselves." The district attorney contended that the present case was altogether different in the specific facts proved, and depended upon an entirely different principle, as to which, he cited authorities to show that no greater similitude than existed in this case was required if the guilty intent was proved, of which the facts here, as he insisted, precluded any doubt.

THE COURT, in charging the jury, said, "The similitude or resemblance" of the alleged counterfeit coin to the genuine required by the Act of Congress on which the prosecution is founded, need not be defined in general terms applicable to all cases. When the allegation is that a counterfeit so resembles, in all respects, the genuine coin as probably to have been intended for the indiscriminate deception of any person into whose hands it may find its way in the ordinary course of business, the similitude required in order to warrant an imputation of guilt ought, perhaps, to be such as might tend to deceive persons exercising ordinary caution, particularly if no artifice has been employed in order to throw a person receiving it off his guard. On this point, however, it is not necessary to express an opinion. Sometimes the allegation, as in the present case, may be that the similitude of the counterfeit coin to the genuine was purposely incomplete or imperfect, because its intended use for purposes of deception was confined to a peculiar class of transactions. Here it is alleged that the intended use of the piece was in transactions in which deception might be

practiced by an artful exhibition of only the head side. A counterfeit may so resemble the genuine coin on one side as to prevent a person seeing that side from using such vigilance as he might otherwise exercise in examining both sides. He may be thus thrown off his guard and misled by the appearance of the side of it exhibited into a belief of its genuineness. In such a case the counterfeiter may have purposely made or left the resemblance on the side which it is intended *not* to exhibit, incomplete or imperfect for the mere purpose of evading the proof of his guilty design, which would otherwise have been more manifest. For cases of this description, a specific definition of the similitude required by the statute may be given by stating as I do, that when the purpose and act are otherwise guilty within the statute, the similitude suffices if, according to the mode of use apparently designed, the piece would have had a probable tendency to mislead persons, whom it might be intended *in this manner* to defraud into a belief of its genuineness. The jury will consider this point of the similitude, first independently of the question whether the piece was actually passed or uttered with a guilty purpose. If they find that it had, according to this definition, the required similitude, they will next inquire whether it was passed, or uttered with a guilty purpose. On this latter point there is no dispute as to the law. It is left upon the testimony, to the jury, who will keep the two questions distinct, giving to the defendant the benefit of any reasonable doubt as to the facts."

The jury, after being out for some time, came into court, and asked the question: "Can a piece of metal be a counterfeit of the United States coin without the impression of the genuine coin, or the denomination?"

THE COURT answered: "If the question is as to the omission of a portion of the devices and legends required by the Act of Congress, such as an omission of the inscription 'United States of America,' or of the words 'one dollar,' I answer that such omission does not prevent the jury from lawfully finding a verdict of guilty, if they believe that the piece, first, had such a tendency to deceive as has been already defined in the charge

of the court; and secondly, was passed or altered with a guilty intent, as has also been explained in the charge." *

The jury retired, and soon afterwards returned with a verdict of guilty.

DISTRICT COURT. DECEMBER 17, 1858.

ADMIRALTY.

THE ARCOLE.

THE PHILADELPHIA STEAM PUMP AND TOWING CO., *Libellants.* JEANES & SCATTERGOOD, *Respondents.*

1. When danger has been incurred in rendering a salvage service, if the owners of a vessel which has rendered it, proceed in their own names and behalf, and not on behalf also of the salvors, to recover a salvage compensation, a decree will not, in general, be made for an amount greater than the owners' quota of the whole salvage.

2. The rule is, in general, the same, when actual danger has not been incurred; if the vessel, in rendering the service, has deviated from her course, or her voyage has been delayed.

3. But, when a salvage service, not attended with danger, has been rendered by a vessel, without any such deviation, or delay, her navigators are ordinarily not entitled to participate in the distribution of the compensation.

4. Therefore, the owners of a steam tow-boat and wrecker, so built and equipped for winter service, as to securely resist the impact and pressure of ice, may, in general, sue alone for, and recover the whole salvage compensation for such relief and assistance to other vessels as may be rendered by her in the regular course of her employment.

5. That such a steamer has not incurred any danger in rendering the service, and has performed it with ease, if her exemption from danger has been consequent upon her particular construction and equipment, and the ease of its performance has been due to the great power of her engine, will not ordinarily diminish the amount of salvage compensation to which her owners are entitled.

6. The criterion to determine whether the assistance rendered has been a salvage service, is, that it has afforded relief from actual or probable danger, distress, or extraordinary difficulty.

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* See Biles *v.* Com., 32 Pa. St. R. 529, for the application of cognate principles to forgery under the common law.

7. If towage alone has afforded such relief, it should be compensated as a salvage service.

8. When a vessel has been engaged for the service of another vessel needing assistance, the circumstances existing at the date of such engagement, as well as those existing when the assistance is afterwards rendered, should be considered in defining the character of the service as salvage or otherwise.

9. Work, however arduous, performed with a view to rendering salvage relief, is not salvage unless its result has been successful, or beneficial.

10. When the work of a salvor, performed in successive stages, and only suspended at intervals between them, has been ultimately beneficial in its result, the whole, from the commencement, is ordinarily compensated as a single continuous or connected salvage service.

11. But this rule does not apply when such continuity of the service has been interrupted. Therefore, when an intended salvage service has been abandoned at the end of an unsuccessful stage of the work, and has been afterwards recommenced and prosecuted successfully, if any compensation is decreed for the former unsuccessful work, it is not measured by the standard of a salvage recompense.

12. The rule that a salvor cannot enforce a bargain as to his compensation which was made with a party requiring his aid at a time of danger or distress, is not always a sufficient preventive of extortion by salvors. Attempted extortion may sometimes constitute such misconduct as to cause a forfeiture or diminution of salvage compensation. Cases may occur in which the bare mention, at the time of peril or difficulty, of the rate or amount of compensation expected will constitute a species of extortion cognizable in a Court of Admiralty.

13. Exorbitancy in a salvor's demand of compensation made after the service has been successfully rendered usually affects only the question of costs. It will not ordinarily prevent him from recovering them, unless there has been a tender on behalf of the party benefited by the service of a reasonable amount of compensation.

LIBEL for towage and salvage service.

THE CASE involved questions, as to the winter towage and salvage service of heavy power steam tugs in the Delaware, which are sufficiently stated in the opinion of the Court. It was argued by Mr. R. P. KANE, for the Libellants, and by Mr. C. M. NEAL, for the Respondents.

CADWALADER, J.

The libellants, as owners of the steam-tug America, proceed in this case against the ship Arcole and her cargo, the vessel and cargo, together, worth between $50,000 and $60,000,

to recover a demand for towage, and alleged salvage service, rendered in the Delaware Bay, on the 30th of January, and 17th and 18th of February, 1857, and for subsequent winter towage from the Bay to Philadelphia. The respondents were consignees at Philadelphia of the Arcole, and owners of her cargo. The America is a large and powerful steamer of the class used as winter tow-boats, and occasional wreckers. They are sometimes called *heavy power tugs,* to distinguish them from the *light harbor tugs* employed in aid of the ordinary navigation of the Delaware, when it is unobstructed by ice.

In the navigation of this river and bay, the light harbor steam-tugs cannot always render the towage service, and other assistance, required in severe winters, particularly that required for inward bound vessels. The steamer belonging to the city of Philadelphia, known as the Iceboat, had, for many years, been employed in breaking the ice in the river, and keeping open the navigation in winter, when the City Councils, by an Ordinance of 27th July, 1850, authorized, under prescribed restrictions, her employment for an adequate compensation, upon any occasion of imminent peril, for the relief of vessels in the river or bay, or on the adjacent coast. This Ordinance had been preceded, and has been followed by Acts of the Legislature of Pennsylvania, to increase the facilities of the navigation through the aid of steam-power, etc., for the relief of vessels disabled, stranded, or otherwise in distress or danger, and for towage purposes. (See the Pamphlet Laws of 1850, pp. 59, 664; 1853, p. 660; 1856, pp. 64, 665; 1857, p. 269.) These acts incorporated Companies associated for affording such relief in different modes. The use of their boats in the respective modes thus authorized was not restricted as the above-mentioned Ordinance restricted that of the city iceboat; but they were, in general, prohibited from transporting goods or passengers in the river or bay. The last of this series of acts, passed on 21st April, 1857, shows that the policy of encouraging investments of capital for these purposes still prevailed in the State legislation at the dates of the occurrences of January and February, 1857, which are the subject of con-

troversy. The preamble of the first of the series passed on 12th of February, 1850, states that the want of powerful and efficient steam-tugs to afford assistance in cases of stranding has caused great losses of vessels and property. The libellants were incorporated by the second act of the series, passed on the 3d of May, 1850.

When a salvage service is rendered by the navigators of a vessel, or other persons on board of her, these parties, and not the vessel, or her owners, are usually deemed the salvors. The vessel's quota of the salvage compensation, receivable by her owners, is, in such a case, usually, though not always, a third of the whole amount. In the usual form of a libel for salvage at their suit, they proceed, as well on their own behalf, as on that of certain salvors named, and all others interested. In an ordinary case, if her owners, instead of proceeding in this form, proceed in their own name, and on their own behalf alone, a decree cannot properly be made for more than their own quota. (1 Newb. 417, 329.) This rule applies, in a case otherwise proper for its application, although no demand is made on behalf of actual salvors, and although no contestant opposes an objection that their interests are not represented by the owners. The Court, of its own motion, where the rule applies, makes the objection on account of the salvors not represented. This rule applies almost and perhaps altogether without exception, where salvors have incurred *actual danger* in rendering the service. Irrespectively, also, of any question of actual danger, it applies when the service of nautical salvors has been attended with such deviation from, or delay in, the course of a voyage as is inseparable from salvage rendered in ordinary navigation. Cases in which salvage service is rendered by the navigators of a vessel whose regular employment is that of a wrecker are not excepted from the operation of the rule when the performance of their service is attended with actual danger. The navigators and owners of the licensed Florida wreckers, therefore, share the rewards received for their lighterage service, and other useful assistance, rendered by them to vessels which are stranded, or in danger of stranding, or other-

wise in peril or distress. (Marvin, § 199 to § 212 and Appendix, pp. 300, 303, 304.) The reefs on the Florida coast are hard and sharp, and the perils of navigation from the direct agency of the winds are there increased by the uncertain variableness of the ocean currents. These wreckers are small sailing vessels which always, on such a coast, share, in some degree, the dangers and hardships of such vessels as they may be able to relieve. But the danger which is considered in determining the definition of a salvage service is that of the property, or persons rescued, not that of the salvors. Danger incurred by salvors, though it may, sometimes, influence a Court in estimating their compensation, is not an essential part of the definition of a salvage service. When a steamer, whose ordinary employment is that of a tow-boat and wrecker, has rendered a salvage service in the *regular course of such employment without any danger* to those on board of her, the practice in England, and in the United States, has been to award the whole compensation to her owners. This has been the mode of adjudication in several of the cases which will hereafter be cited. If a different practice has prevailed in any of the judicial districts of the United States, the difference is attributable, probably, to conventional arrangements, or local usages. I am not aware that any such local differences in practice exist. The question does not affect interests of parties to whom past services have been rendered. It can effect prospectively the general interests of navigation so far only as the policy of encouraging the daring and enterprise of salvors may be concerned. I do not propose to inquire how far the distribution of compensation among domestic salvors for their services rendered, not upon the high seas, but within a territorial maritime jurisdiction in which the performance of such services is a part of the regular occupation in which they are engaged, may be regulated by local usages of the respective ports and harbors in which they are thus employed. The present case involves no such question.

The particular character of the winter salvage service of the America has recently been considered in the Circuit Court for

the Delaware District in the case of a salvage of the brig Caroline and her cargo. In that case, Chief Justice Taney thought it not a sufficient objection to the allowance of a liberal salvage compensation, "that the steamboat encountered no danger, and consumed but little time in rescuing the brig and cargo from the peril in which they were placed." In answer to this objection, he said: "It must be remembered that the steam-tug had, by the prudent foresight of her owners, and at a heavy expense, been prepared to render such services promptly and without much danger to herself, or her crew. She was strongly built, well manned, and placed at the breakwater in the Delaware, where it was well known many vessels must be detained at this inclement season, and would be constantly in danger from the winds and the ice. She was kept there at a heavy daily expense, and with her crew constantly exposed to severe weather, but yet always in readiness to go to the aid of a vessel in distress. It is the well-established policy of Courts of Admiralty to remunerate liberally salvors who risk life and property, or suffer hardships in rescuing a vessel or cargo when in danger of perishing. And I cannot perceive any reason why a salvor should be entitled to less, who expends his money in preparing a vessel by which the service can be rendered with less risk, and keeps her at the place where danger is anticipated, at a heavy daily expense, in order that assistance may be promptly rendered when the emergency shall arise. The reason assigned for a liberal allowance in the one case applies with equal force in the other." (Am. Law Reg., Feb., 1858, VI, 227.) These remarks were made in a case in which, though the America was not in any danger, some of her crew boarded the Caroline, and may perhaps have been exposed to particular hardship if not danger. Whether they received any portion of the salvage decreed, I do not know. The report seems to state the case as if the whole was awarded to her owners. I have not inquired how the decree was, in this respect, framed, because, in the case before me, the services were not rendered under circumstances involving any salvor in personal danger. In the present case, the navigators of the

America were exempted from the dangers which would otherwise have been attendant upon the performance of the services rendered, because her owners had invested their funds in constructing and equipping her in the particular mode which Chief Justice Taney has described. His reasoning was adapted to the effect attributable to this outlay of their funds as between them, and the parties to whom the salvage service was rendered. Its logical application, in the present case, is, however, scarcely less direct in excluding her navigators from any share of the compensation for a salvage service in the performance of which their security from danger had been purchased for them by the same investment of the libellants' funds.

For the twofold, or compound reason, that no danger was incurred by any person on board of the America in rendering the service in question, and that the service, if legally salvage, was rendered in the regular course of her ordinary winter employment, I have no difficulty in deciding that her owners are entitled to the whole of any salvage for which the Arcole and her cargo may be liable.

The regular employment of a steam-tug, in aid of a navigation liable to obstruction from ordinary local causes, may require her, in the performance of her ordinary duties of towage, to render incidental, or occasional services more arduous than those elsewhere impliedly contracted for by tow-boats. The assistance which she may thus render in the course of her business is not a salvage service, unless it relieves persons or property from actual danger, distress, or unusual difficulty. The large and powerful steam-tugs employed to facilitate the navigation of the Mississippi constantly take across the bar near the mouth of that river, vessels whose draught is greater than the depth of water in the channel. The bottom there is of shifting layers of soft mud, through which such vessels are dragged without encountering any resistance which persons of nautical experience deem dangerous. The chance of grounding on this bar, as has appeared in a case recently considered in this Court, is encountered voluntarily for the advantage of carrying a full cargo. Vessels are often aground there for

hours or days, and sometimes for weeks, before they are dragged through. Compensation for this heavy towage through the muddy bottom, and occasionally also for incidental assistance rendered by the tugs as lighters, is, I believe, often paid at somewhat high rates. But these rates are not measured according to the standard of the salvage remuneration which would be chargeable if the vessels aground were in danger. Some shoals higher up the river, where the bottom is sandy, are there called sandbanks. Grounding even on these banks does not appear to be considered a dangerous occurrence in the navigation of that river. The Leathers, a steamer on fire, and scuttled, was run upon such a bank, about sixty miles above New Orleans, in order to save the lives of the persons on board. Another steamer, called the Robb, aided by a third steamer, the St. Charles, hauled the Leathers off the sandbank. For certain *other* acts, a salvage compensation was awarded to the Robb, but none to the St. Charles. As to the assistance rendered by the St. Charles in drawing the Leathers off the sandbar, the Judge said: "We are told by the pilot of the Leathers that the power of the Robb was sufficient without her. Besides, *the drawing a boat off when aground is a common act of courtesy among steamboats, for which no claim of salvage is ever asserted.* If the services of the Robb had extended no farther than this simple act of courtesy, it is hardly probable that she would have asserted any claim for salvage compensation." (1 Newb. 429.) In the definition of salvage services in other waters, little aid is derivable from rules which local physical peculiarities and local usages have thus established for the navigation of the Mississippi. The navigation of that river may be contrasted with the above-described navigation upon the coast of Florida, where no vessel can approach any of the shoals without incurring a liability to danger. Neither navigation furnishes a proper analogy to that of the Delaware.

To define for the navigation of the Delaware the difference between certain acts of the regular winter towage service of such a tug as the America, and acts of salvage may, sometimes, perhaps, be very difficult. The regular employment of a winter

tug, in aid of navigation so liable to serious obstruction from ice, must require her in the performance of her duties of towage to make occasional deviations and rests, and render to her tows occasional services more arduous than those performable by light harbor tugs when the river and bay are clear of ice. An indiscriminate imposition, in favor of her owners, of salvage charges for the towage services rendered in the performance of her winter duties would frustrate the salutary purposes for which the libellants and other such associations are incorporated. On the other hand, motives of justice, not less than of policy, require that the navigators and owners of such a tug should receive a reasonable salvage compensation for the services which they may render in relieving vessels from danger or distress.

When the service rendered is that of towage alone, the criterion of the right to salvage is the existence of distress, danger, or extraordinary difficulty from which the towage service rescues the vessel towed. The towage may thus be the means of rendering a salvage service, or, as the proposition has been more succinctly stated, the *towage may constitute salvage.* Judge Betts, an Admiralty jurist of great experience, referring to cases of vessels in distress, or peril, requiring towage, has said: "I am not aware of any determinate rule of law which discriminates towage service from salvage. It is manifest that circumstances may exist rendering towage the most efficient, if not the only service which can be afforded in saving property and life. A dismantled and disabled ship of large burden filled with passengers may be thus rescued by a very small vessel wholly inadequate even to receiving on board the sufferers on the wreck. It has therefore never seemed to me that any advance was made towards solving the question whether a service was salvage in its character, and to be rewarded as such, by proving that it was performed by towing only. If there is any intrinsic difference between towage and salvage, it would appear to be only that salvage service must always be that given in rescue or relief of property in imminent peril of loss or deterioration, while towage may be applied merely in aid of a

vessel against adverse winds or tides, or in difficult passages, while she is in possession of her ordinary powers of locomotion. (Abbott, 227, 228.) In England, Sir John Nicholl once observed to the Trinity Masters, "that to estimate a salvage service, all the circumstances must be taken into consideration in a *combined* view; and that if towage led to the rescue of a vessel from danger, it should be remunerated as salvage; or, if an engagement even were made in port to go out, and to tow, yet that unforeseen cicumstances might convert such towage into a salvage service." (3 Hagg, 428.)

Under an ordinary contract for simple towage, performable by a light harbor tug, or other steamer, her service, if successfully rendered, becomes that of *salvage,* so soon as an unavoidable cause, not attributable either to her insufficiency, or to the fault of her navigator, makes it impracticable for her to conduct the towed vessel in the direction of its destination. When the performance of the service originally contracted for thus becomes impossible, the tug is not at liberty to abandon the vessel she has engaged to tow. Her duty requires her to render all the assistance in her power in bringing this vessel to a position of security. The late case of the Galatea in the English Admiralty (May 22, 1858,) recognizes the existence of a rule that the tug, for so doing, is always "entitled to a salvage remuneration."

When a vessel not in tow incurs any danger, and afterwards engages and receives towage aid which rescues her from the danger, the rule is also to remunerate the service as *salvage.* This rule has been applied by the English Court of Admiralty where the towing vessel was a steamer, and the vessel towed was afloat at the commencement of the service, and continued afloat until its termination, jury rigged, and with a fair wind, and the service, though she was in distress, was not essential to her safety. The steamer incurred no risk. There was nothing to strain her engine. The Trinity Masters were of opinion that the nautical service rendered "was merely towage, but should be handsomely rewarded." Sir John Nicholl decreed a compensation which, from its amount, can only have

been awarded as *salvage*. (3 Hagg. 427.) This decision has been followed in the Southern District of New York, where the vessel which rendered the towage service, and received a salvage compensation was a harbor tug of the class of "professional wreckers and towers." An extract has already been given from the opinion of Judge Betts in this case. In this opinion the English cases prior to 1848 are cited. (Abbott, Rep. 222, 234.)

In determining the rate, or amount, of salvage for a towage or other service the rule of the English Admiralty is that, other circumstances being alike, steamboats, as having the ability to render more prompt and efficacious assistance than sailing vessels, are encouraged by a more liberal reward. The motive of this rule is one of policy that steamers may be induced to leave their ports, or turn aside from their voyages, to volunteer their services to vessels in danger or distress. Judge Betts has therefore questioned its applicability to steamers of the class of *professional wreckers and tow-boats*. He thinks that their superiority to sailing vessels for such service will secure the preference for that employment when they can be obtained, and that their "calling of itself will be sufficiently encouraging and advantageous without the aid of the stimulus of high salvage rewards." "At most," he says, "in reference to mere harbor service, and that rendered about the mouths of their own ports, it is by no means manifest that steamers whose regular pursuit is to tow and relieve vessels, should be regarded as meriting a reward out of all relation and proportion to what would have been accepted as satisfactory on a fair bargain for their services." (Abbott R. 234.) These remarks probably were intended, however, as applicable only to tugs making short trips between New York and Sandy Hook, in a harbor unobstructed by ice. At the date of his opinion their services for the relief of a vessel in distress might under what he thus called "a fair bargain" have been obtained for $10 per hour, computing the time from the commencement of the expedition until the return to the point of departure. His objection was to the allowance of a disproportionate excess above

this rate of their service. In the case before him, which was not one of any particular merit, he allowed salvage at five times this rate.

Chief Justice Taney, in the above-cited case of the Caroline, appears to have considered such limited views on the subject of salvage compensation inapplicable to a steamer like the America on duty between New Castle and the Capes of Delaware in the depth of a severe winter. In that case, the Caroline, the vessel assisted, was at the breakwater. She had sustained injuries from contact with heavy floating ice, and required lightening that she might be repaired, so as to resist the further impact and pressure of the ice, which might otherwise, at the next ebb tide, have been very dangerous. The service of chief importance rendered her by the America was that of lighterage. The America, being then very nearly out of coal, was able to render this service with facility to great advantage. The crew of the Caroline were, moreover, opportunely reinforced by men from the America, who aided in the removal of the Caroline's deck load, which had been so frozen fast, as without such assistance to have baffled efforts to get at the lading below in order to lighten her. "The salvors," in the opinion of the Chief Justice, "were entitled to the same measure of compensation that the Court would have deemed just if the vessel had been rescued by the boats of the surrounding ships, amid the hazards which such an enterprise, on their part, would evidently have brought with it." The situation of the America, in this case, he said, "was unlike that of a steamboat that goes out of her way for a short distance, and delays her voyage for a few hours, in order to afford the necessary relief. *Her* sacrifice of time and labor would be small. But here was a daily heavy expense; and she was always prepared, at the point of danger, when assistance was needed." (Am. Law Reg., Feb., 1858, VI, 227, 228.)

In the winter business of the Philadelphia city iceboat, a trip, not in the service of a particular vessel, but for the towage, at prescribed rates, of any such vessels as may require it, is called a "regular tow." The "charge for the use of the boat, not in

a regular tow, and not relieving vessels in distress," is $15 per hour from the commencement of the expedition until her return. This charge for ordinary winter towage, or other ordinary winter service, is also made by two of the incorporated companies mentioned above, each of which employs a heavy power tug in the river and bay. But there is no regular charge for the time occupied by either of these tugs, or by the iceboat, when engaged in the service of a vessel in danger, distress, or extraordinary difficulty. At the dates of the occurrences detailed below, the iceboat was not engaged in any service in the bay. Her boilers were adapted to the river service only. She was, at no time during this period, below Reedy Island. Of the two other heavy power tugs, one was absent, having gone to a Southern port. The only tow-boat of this class below Reedy Island was the America. The only other steam tow-boat of any kind at hand was a light harbor tug, which appears to have received on one occasion $10 per hour for such assistance as she was able to render when in the service of a stranded vessel.

The Arcole reached the bay, inward bound, on the 30th of January, 1857. On that, and several following days, the river was filled with floating ice, of which large quantities were in the bay, occasioning as it came down serious injury to some vessels, and peril to others. The ice rendered it unsafe to proceed further upward than the breakwater, where it was to many vessels important that an anchorage should be reached without loss of time. The services of the America were, therefore, in great request. She charged large sums of money for the towage of vessels for very short distances. The America, on that day, towed the Arcole to the breakwater, where she was anchored. This towage service occupied, as has been said, only seventeen minutes. The Captain of the America charged, and the libellants now demand, for it, the sum of $250. This demand is disputed. Its reasonableness has not been shown otherwise than by proof that he charged amounts almost, perhaps, as high proportionally, for similar towage of other vessels whose navigators acquiesced in, or submitted to, the

demands. They, perhaps, may have thought that they had no alternative. Their acquiescence, however, fortifies other evidence from which the conclusion appears to be that this towage service entitled the America to a reasonable salvage remuneration. The proper amount of this compensation cannot, however, approximate the sum demanded.

On the same day, the 30th of January, the America left the Arcole at the breakwater. On the 1st of February, the America rendered to the Caroline the salvage services above mentioned. In compensation for them $1,700 was afterwards decreed by the Circuit Court for the Delaware District, whose opinion in the case has already been twice quoted. On the 2d of February, the America went for fuel to New York. She there took in coal, which probably prevented her from performing lighterage service with facility after her return to the Delaware Bay. The testimony does not state when she returned; but we find her again at the breakwater on the 7th of February. Between the 7th and 10th, she was, when not at anchor, cruising among the vessels detained at the breakwater, supplying some of them with provisions. On the evening of the 10th, she towed the same brig Caroline, which had been assisted on the 1st of the month, and a large ship to New Castle. So far as the Caroline was concerned, the compensation for this towage was included as an incident, or completion of the prior salvage service, in the $1,700 decreed as above. The America remained ice-bound at New Castle for two days. On the 12th, she got out, went down to the bay, and towed up some vessels to New Castle, where she left them, and went down to Reedy Island. She remained at Reedy Island until the 14th.

In the meantime, the Arcole, from the 30th of January, when she was towed, as above, to the breakwater, had been detained there by the ice, until the 11th of February. A pilot, who had boarded her on the 30th from the America, had not left her. Under his direction, she got under way on the 11th, and proceeded a few miles; but, seeing ice ahead, returned to the breakwater. On the 12th, she again got under way with a

fleet of vessels which had been detained at the breakwater, and made some progress, when, encountering a head wind, she was anchored for the night. On the 13th, she was surrounded by skim ice. The wind being still ahead, her direction was changed with a view to returning to the breakwater; but, the wind dying away, she was anchored for another night. On the next morning, the 14th, she resumed her course upward and proceeded for some distance; but was caught, first in one floating field of ice, and then in another, and taken out of her course until she grounded on a hard sand shoal below the mouth of Cohansey Creek. She was aground for four days. Witnesses who describe her position testify that it was one of some danger. Her draught was between 17½ and 18 feet. At high tide, there was perhaps nearly enough water to float her. "At low water," in the language of one of the witnesses, "she heeled down, lay hard on the bilge. Sometimes she would heel down and heel up, according to the wind and tide, and local causes." She was a sharp built vessel, and not new. The ice had cut her a good deal before she grounded, and it also cut her while she was aground. But she did not then, or at any time afterwards, leak. Her danger depended upon her liability to two hazards, the one, that of the ice above shifting and coming down so as to cut her through, the other, that of such a gale as might have caused her to bilge. Neither occurrence, perhaps, was at that season very improbable. But there was, in fact, no stormy weather, nor did any main body of ice come down while she was upon the shoal. She seems to have been, at no time, in *immediate* peril. By lightening her, she could, in a few hours, have been set afloat; and the conduct of all parties, in the four days that she remained there, indicates that she was not regarded as in any serious eventual danger. Any assistance to set her afloat would nevertheless have constituted a useful salvage service; and there, unquestionably, was urgent need of some such assistance.

Many other vessels in the bay were in distress or difficulty. One of them, the Mahlon Williamson, was aground upon a shoal above the Cohansey. The Williamson and the Arcole

grounded on the same day, the 14th. They were about seven miles apart.

On the 14th, the America left Reedy Island, and went down the bay, visiting, in succession, the Williamson and the Arcole, both aground. She did nothing on that day for the relief of either vessel, but rendered some towage service to other vessels which were afloat. She took the captain of the Arcole, with his niece, and a trunk of baggage, to New Castle, from which place he communicated, by telegraph, with the respondents. The America remained at New Castle until the next morning, the 15th, when, at about ten o'clock, she got under way, with the captain of the Arcole on board, and went down to the Williamson. She tugged with a 10-inch hawser at the Williamson, for an hour and a half, and succeeded in changing her position on the shoal, but could not get her off. At the end of this time the hawser broke. The captain of the America was then requested by the captain of the Arcole to proceed to his vessel. To this the captain of the Williamson objected, insisting upon the America remaining with the Williamson. At about this time, the light harbor tug mentioned above was passing. The captain of the Williamson then engaged this small tug for the next high tide, when the work of pulling off the Williamson was to be resumed by both tugs. In the meantime, the captains of the Williamson and the Arcole made "a sort of compromise" under which the America remained at anchor near the Williamson, and the two captains went in the small tug to the Arcole. They did not reach her until the tide was very low. They went on board of her, and remained there about three-quarters of an hour, after which they returned to the Williamson, where the America was still at anchor. The captain of the Arcole then again went on board of the America. The work at the Williamson was resumed on the 16th. On this day she was got off, and was towed into the channel to a point about two miles distant from the shoal on which she had been stranded. Both tugs remained with her until the 17th, when they left their moorings, and proceeded to the Arcole. Her captain had been all this time on board

of the America. A consultation took place from her deck between him and the pilot, who was on board of the Arcole, as to the expediency of trying to get the vessel off by tugging without previously lightening her. The pilot said that it would do no harm to try. The captain replied, that "it would be a harm if the ship didn't come off." They nevertheless determined to try the experiment. The America drawing no more than about twelve feet of water, and the other tug only about six feet, they had every opportunity to pull her off if it could have been done without lightening her. They made the effort, both tugs pulling together, beginning the work at about high tide, and continuing it perseveringly for, perhaps, more than two hours without moving her, when the hawser of the America broke. It was a new 10-inch hawser. The captain of the Arcole then despatched the small tug to the Cohansey to engage a lighter. One of 200 tons was accordingly brought down to the Arcole. The America had, in the meantime, left her. The respondents, in their answer, state that she did so under an engagement to return by the next high tide. There is no proof that any such engagement was made. If it was *not* made, the America cannot be said to have *continued in the service* of the Arcole. If it *was* made, it was *not fulfilled.* Before the next full tide, the lighter had taken out a portion of the Arcole's cargo. At full tide the America was not at hand. The small tug tried to pull off the Arcole, but failed in the effort. This tide was thus lost. The work of lightening her was then resumed. Her captain went, in the small tug, to bring back the America. In the meantime, the America had returned to the Williamson, had towed her to Delaware City, and had also performed some towage service for another vessel. On the 18th, in the afternoon, about an hour before the next full tide, the captain of the Arcole returned to her with the America. During his absence, the discharge into the lighter of the Arcole's lading had been continued until she was raised in the water about a foot and a half above her draught when she grounded. The respondents allege that, when thus lightened, she, at high tide, floated in the bed which

had been formed by her previous oscillations in the sand. This, though not directly proved, may perhaps be inferred from the testimony. Though she may have thus floated in her bed, she certainly, however, did not so float that she could have been taken from it into the channel without aid of some kind; and she, probably, was not in a situation to have dispensed with towage assistance. She was, nevertheless, at full tide, *without any difficulty,* drawn by the America into the channel. The America afterwards took her to Philadelphia without encountering any difficulties on the way other than those of the ordinary winter towage.

The respondents admit that the work performed at the shoal by the America should be liberally compensated. But they deny that it was a *salvage* service. We have seen that three trips, in all, were made by the America to the Arcole when aground. On the first, nothing to relieve her was even attempted. Three days intervened before the second, when an effort was made which wholly failed of success. Between this attempt and the third visit, she was lightened, the America not participating, directly or indirectly, in the lighterage service, or being in attendance, or even at hand. On the third visit the America, whose prior service had been wholly ineffectual, was, in consequence of the intervening lighterage, able, with ease, to draw her off.

Had the Arcole not have been thus lightened between the America's failure, on the 17th, to get her off, and return to her on the 18th—or, had the America performed or participated in the intermediate work of lightening her—or, without participating in it, remained in her service after the unsuccessful tugging on the 17th—the work on the 18th, of drawing her off when lightened, might, fairly, have been deemed the successful termination of a *continued* service, rendered on the two days, by the two tugs, aided, in the later stage of the work, by the Cohansey lighter. But the America, when her hawser broke on the 17th, and lighterage was resolved upon, left the Arcole and was employed in assisting other vessels. For aught we know, if she had not been specially re-engaged on the 18th,

she would not have returned to the Arcole at the shoal. Her work at the Arcole on the 17th, and resumed work of the 18th, were, therefore, distinct unconnected services.

Her work on the 17th, considered separately, however arduous, and however faithfully performed, having been altogether *unsuccessful,* was not a *salvage* service. The Circuit Court, for this district, in the case of the Dodge Healy, in the year 1827, recognized, as undisputed, the principle that a claim for salvage, however meritorious, never can be allowed unless the property has been in fact rescued from danger, or the service rendered has otherwise resulted beneficially. (4 Wash. C. C. 651, 656.) This rule has been since applied in the English Admiralty. (3 Notes of Cases, 589.) Where the work of assistance has only been suspended at recurring intervals between successive stages of its performance, its continuity is not so interrupted that, if it is ultimately successful, the whole of it from the commencement of its first stage will not constitute a single salvage service. In the case of the Mahlon Williamson, of which the circumstances have been detailed, the service rendered by the America was of this continuous character. She remained at the side of the Williamson, in her service, during two tides, though not at work in the intervening period, and ultimately placed her in the channel with her entire cargo on board. For the entire service rendered in this case referees of great nautical experience therefore awarded a salvage compensation of $3,000. But, where the continuity of the service has been interrupted by its abandonment at the end of an unsuccessful stage of it, the circumstance that it has been subsequently recommenced, and, after such resumption, prosecuted with ultimate success, cannot prevent the former stage of it from falling within the rule applicable to a single unsuccessful service. The case of a steamer in the Mississippi River, called the Leathers, has already been mentioned. She was on fire, and, in order to save the lives of those on board, was run hard ashore on a sand bank, having been scuttled for the purpose of extinguishing the fire. Another steamer, the St. Charles, coming to her assistance, made strenuous but unsuccessful

efforts to pull her off the bank, and extinguish the fire. A large portion of the deck load of the Leathers was taken on board of the St. Charles, under an agreement that she should carry it to its destination, and receive the full freight. A third steamer, the Robb, afterwards arrived. As has already been stated, the Robb, aided by the St. Charles, hauled the Leathers off the sand bank. The Robb took on board the passengers of the Leathers, and a large portion of that part of her deck load which had not been previously taken off by the St. Charles; and subsequently rendered important salvage services in which the St. Charles could not participate. Judge McCaleb allowed a liberal salvage compensation for the services rendered by the Robb. He decided, however, that the St. Charles was not entitled to compensation as a salvor. His views of the service rendered by her in assisting to draw the Leathers off the bank have been stated under a former head. He was of opinion that the freight of the goods transshipped from her deck was a sufficient compensation for the service performed in removing them, and for any other assistance that had been rendered by the St. Charles. He thought that the work performed by her before the arrival of the Robb *had not resulted in any benefit,* and *therefore,* however meritorious in itself, was *not* a salvage service. (1 Newb. 428.) The case of the Pandora, before the same Judge, was that of a bark laden with cotton discovered to be on fire while she lay moored at a wharf at New Orleans. By order of the proper authorities of the city she was towed by a steam tug across the river to a point near the opposite shore, where *other* parties afterwards rendered services for which a salvage compensation was decreed. The Judge said of the tug which towed the burning vessel across the river: "I cannot regard her in the light of a salvor. She did not actually save the hull of the bark and her cargo, for she abandoned them before they were finally rescued by the salvors." But he decided that this tug, though she had not earned salvage, was entitled to a reasonable compensation for *towage.* (1 Newb. 442; see 3 Notes of Cases, 589.)

The America, for her unsuccessful tugging on the 17th,

should be compensated, neither as a salvor, nor as a mere winter tow-boat, but as a wrecker specially engaged in arduous work of which the performance was attended with frequent shocks and strains of her hull and engine. The work described by the witnesses which finally broke a new 10-inch hawser would not be more than barely compensated by an allowance of three or four times her ordinary towage charge of $15 per hour, computing the whole time four hours, of which two may be estimated as the duration of the full tide, and one may be allowed for each of her passages to and from the shoal. An expectation of receiving even such a compensation might often, perhaps, be an inadequate inducement to the performance of such work, if the prospect of a successful result did not encourage the hope of receiving a salvage remuneration.

The successful assistance rendered by the America to the Arcole on the 18th was a *salvage* service. The respondents object that when the America arrived at the shoal on that day, the Arcole had been so lightened as no longer to be in danger. But, assuming that she floated in her bed at high tide, there is no reason to believe that she could have been gotten out of it, without further lighterage, by merely carrying out anchors. If getting her off in this mode had been possible, it would have been tried. If it would otherwise have been possible, we do not know how far it might have been interfered with by ice. The evidence indicates, I think, that she was neither in fact, nor in her master's opinion, in a situation to dispense with steam towage; and I doubt if she could, without great imprudence, have dispensed with a heavy power tug's assistance when such aid was obtainable. (See 3 Hagg. 386.) The fact that the America *was* re-engaged in her service on the 18th, goes far towards proving that there was a contingent, if not absolute, necessity for such assistance. The *purpose* of re-engaging her must have been that her towage, assisted by the effect of the previous lighterage, might *insure* the Arcole's extrication from her difficulty without the loss of another tide. Had the America herself performed in succession the two services of a lighter and a tug, they would have together con-

stituted a compound salvage service of which neither element could have been disregarded. The distinction that they were performed by two vessels might have been attended with a material difference if the lighterage service had been completed and the Arcole afloat before the re-engagement of the America. But such was not the fact. The lighterage was continued, as has already been stated, while the captain of the Arcole was absent, on his expedition in the small tug to bring back the America. The re-engagement of the America therefore occurred when the effect of the lighterage must have been to some extent unknown. When a steam tow-boat and wrecker, or other steamer, or, indeed, when a vessel of any kind, is engaged to come from a point at any distance to the aid of a vessel in distress, the character of her service as *intended* at the time of making the engagement, as well as the character of the service afterwards *rendered* under it, should be considered. Upon a question of salvage, according to decisions which have been cited, a view of all the circumstances in *combination*, commencing at the time of her engagement in the service, is to be taken. (Abbott Rep. 222; 3 Hagg. 428.) The *intended* service must in such a case be understood, for the present purpose, as including all *probable* assistance which, under the knowledge possessed at the time and place of her engagement, may have been contingently requirable in order to effectuate the desired relief. In the first case in which salvage was decreed in England in favor of a steamer, she was engaged at Dover in the service of a vessel in the Downs bound for Ramsgate. This vessel had struck upon a sand, but, before it was decided to engage a steamer, had been removed from it by the assistance of a small sailing vessel of the class known as Deal boats. Lord Stowell, after observing that the vessel assisted was no longer *in a situation of actual danger*, said: "but still there was an *apprehension of danger*, and provision was required to be made for the future safety of the vessel. It was recommended that a steam vessel from Dover should be sent for. It therefore cannot be denied that the agency of a steamboat was considered highly useful and desirable. * * *

The vessel was of great wealth. She resorted to the assistance of a steamboat, after having resorted to one of a lower species." (1 Hagg. 246.) These passages are the only parts of his opinion which concern the situation of the vessel assisted. They apply in the present case to the objection under consideration. But there was more than "an apprehension of danger," as to the Arcole, when the America was, on the 18th, engaged to return to her assistance. How far the lightening of her then in progress might lessen the danger by the time of high tide, when the ultimate service was to be rendered, was a contingency of which the determination could not be foreseen. How, in fact, it was determined, we do not, at this day, know. The allegation that the danger was at an end rests upon the fact that the ultimate service was performed with ease. But this ease of its performance may be attributable solely to the great power of the America's engines. Her service was required for the sake of their power. The small tug might again, as at the previous tide, have been unable to move the Arcole. The greater power of the America enabled her not only to move her, but to do it with ease. This ease in the performance of the work does not deprive it of the character of a salvage service.

The *amounts* of compensation for the several salvage services of 30th January and 18th February, and for the intermediate work of the 17th, which was not salvage, are, lastly, to be determined.

The captain of the Arcole appears to have known the rule of law that a salvor who has rendered a successful service cannot, in general, enforce a bargain as to the rate or amount of his compensation made by him at the period of danger, or distress, with a party requiring his assistance. He appears also to have known that a salvor, by insisting on such a bargain being made before he renders the service, may sometimes incur a prejudicial imputation of extortionate conduct. But he seems not to have been aware that a salvor should, under some circumstances, avoid the previous discussion, or even *mention*, of the subject of compensation. This ought to be the rule of

his conduct under circumstances which give him a continued or temporary *monopoly* of opportunities of rendering salvage services of which vessels in danger, distress, or difficulty cannot refuse the proffer. Such a tug as the America, in consequence of the more or less prolonged absence of other steamers of her class from the river and bay, may often thus have a monopoly of the opportunities, which the difficulties of a winter navigation afford, of making salvage profits from dangers encountered by sailing vessels. This was the case at the dates of her services in question. Every vessel of the large fleet then in the bay would have been greatly benefited by steam towage, or by such other assistance as the America *alone* was at hand to render. Nothing but unjust extortion on the one side, or injudicious parsimony on the other, could have induced the rejection by any of these vessels of an offer of her services. A very limited number of them only, however, could receive her assistance, and none of them, perhaps, could obtain it to the full extent which was desirable. Circumstances gave to her captain the choice of the vessels to which her assistance should be rendered. This choice he was not at liberty to regulate, at a crisis of peril or difficulty, with a view to her owners' emolument. He was bound, in the first instance, to rescue, or aid, such vessels as might be in the greatest immediate or eventual danger, or distress, without any discrimination with a view to the expected profit from assistance to one vessel rather than to another. At such a crisis, to discuss, or mention, the rate or sum expected in the way of compensation might, in effect, be to indicate that the readiest service would be rendered where the greatest compensation might be expected. This would be scarcely less extortionate than to insist upon a positive bargain, such as no salvor is at liberty to require at a season of such peril.

Ordinarily, a mere attempt at extortion by a salvor may not involve a forfeiture of his compensation, or even cause a reduction of its amount. The courts have usually been content with manifesting in their decrees a disregard of all bargains as to salvage compensation which have not been made with a fair

opportunity to select the person engaged among a sufficient number of parties capable and ready for the service. But, in the case of a salvor whose professed occupation is that of aiding vessels in distress, and whose only legal merits are those inherent in such an occupation, any misconduct in imposing exorbitant demands upon parties unable to decline offers of his assistance ought not less to cause a reduction, or sometimes even forfeiture of compensation, than misconduct of other kinds usually followed by such consequences. Direct extortionate conduct in requiring previous bargains to be made by parties relieved, may sometimes be not less liable to censure than indirect extortion consisting in the suggestion of expectations which parties in danger may think it unsafe to disappoint. The mere non-enforcement of a previous bargain as to compensation, therefore, may not always be a sufficient preventive of extortion.

In the present case, the testimony on this point is not very distinct; and the subject has not, apparently, attracted much of the attention of the opposing litigants. I cannot, therefore, on this ground, without further investigation, make a deduction from the salvage compensation which would otherwise be decreed. On the other hand, there is more testimony on the subject than I can wholly disregard. If the respondents ask a reference of the case to a commissioner on this point, I will therefore order it with special instructions defining his duties. Unless the reference is asked, I will, however, assume that, upon the result of such an investigation, the conduct of the captain of the America would be so explained as to appear liable to no just censure. If the reference is not asked, I will, upon this assumption, make a decree in favor of the libellants for $1,000. This I think a liberal recompense.

The libellants have demanded $3,500. This demand may seen exorbitantly high. But such exorbitancy is a usual incident of claims for salvage. When it does not occur until after the service has been rendered, it affects only the question of costs, which ordinarily follow the decree unless the party benefited by the salvage has made a tender of a reasonable amount

of compensation. In the present case, there has not been any tender, formal or informal, before or since the commencement of the proceedings. In the correspondence which preceded their commencement, the respondents professed a willingness to settle the demand upon reasonable and liberal principles; but they named no sum of money which they were willing to pay. The costs of the cause, including, probably, those of the reference if it should be ordered, must, therefore, be borne by the respondents.

No reference was asked on behalf of the respondents. The decree was for $1,000 and costs. Both parties acquiesced in the decree.

DISTRICT COURT. MARCH 19, 1859.

ADMIRALTY.

THE MAJOR REYBOLD *v.* THE TELEGRAPH.

Damages for the detention of a vessel occasioned by injury from collision should be the net freight or hire of a vessel while in her customary employment, to be ascertained by an average of the market rates of such employment within certain limits; or by the mean of the rates attested to by witnesses as having been received. Such damages are not speculative.

Exceptions to Commissioners' Report.

This was a cause of collision occurring March 20, 1857, on the Delaware River near Tinicum Island. A cross libel was filed by the defendants and the decree was in their favor. Upon the question whether the damages should include a claim for demurrage as allowed by the commissioner, the following opinion was filed:

CADWALADER, J.

In this case the only point of exception is to the rate of $30 per day allowed by this commissioner for demurrage. The objection to this allowance, as it has been stated in argument, is, that the commissioner has adopted a speculative profit which might have been earned by the vessel as the standard or measure

of the damage suffered from her detention. But this is an entire mistake. The standard which he has adopted affords a *certain,* as distinguished from a speculative, measure of the damage from delay. This measure is the daily freight, or net hire, which the vessel would have earned if engaged in her customary employment. It is no more speculative than the damage which may properly be assessed for the use of a house or farm which has been unoccupied while its owner has been kept out of possession. The measure of his damage is the net rent which he would have received for it if in possession. In the present case the net freight, or hire, of the vessel, resembles the net rent of the house or farm. If an owner chooses to occupy the house or farm himself, or to run the vessel on his own account, the rent or hire that he could obtain from another person is the measure of the value of his own use of the subject.

Under the Roman law and under the common law, the *theoretical* measure of the damage of an injured party has never been less than the amount in money that will afford him indemnity. From considerations of general convenience or of the importance of uniformity in the application of specific values the practical measure may sometimes differ from the theoretical standard. The present is not such a case. The case is within a familiar rule that the amount of damage may be determined either by the value of an existing thing which has been taken from the party damnified, or by that of such certain profit as he might have made if the injury had not been sustained. The loss of a *speculative* profit is not recoverable. But a compensation for the hire of a ship or of a carriage is not a speculative profit. It is determinable by the usual market rate of such hire at the time in question.

Since the report of the commissioner was filed the deposition of Mr. Souder on behalf of the party in whose favor the report was made has been taken. I do not think that it strengthens the case already presented on behalf of this party. I think that it was made out by the previous testimony sufficiently to sustain the report. That testimony sufficiently

showed the market rate, between certain limits of the daily hire, which would have been obtainable at the time for such a vessel, to cast the burden of disproving it on the other side. This not having been done, the duty of the commissioner was to determine the proper daily allowance between these limits. He might have taken an average of all the rates named without regard to the means of knowledge of the witnesses, or he might have taken the mean rate of those attested by the witnesses or witness whose knowledge of the subject rendered his or their testimony most trustworthy. He adopted the latter measure, and, in so doing, appears to have determined the question judiciously.

The report is confirmed in all respects, and the decree will be entered accordingly.

DISTRICT COURT. APRIL 8, 1859.

ADMIRALTY.

MILLER AND OTHERS, MARINERS OF THE BARQUE CHARLOTTE E. TAY, *v.* SAILS, RIGGING, AND CERTAIN LOOSE ARTICLES SAVED FROM THE CHILIAN SHIP MARTINEZ DIAZ.

1. When a ship at sea was on fire, and there was no hope of saving her, a transfer was made by her captain of all things in her belonging to her owners that could be saved, as a compensation to the navigators of another vessel for receiving himself and his crew with their own personal effects on board of the latter vessel. This transfer conferred upon the navigators of the latter vessel no property in things which they saved from the burning vessel, belonging to her owners.

2. The arrangement was of no effect as an agreement for a salvage compensation. Such an appropriation of the *whole* of her owners' property that might be saved was repugnant to the nature of salvage.

3. The arrangement was unreasonable if not extortionate; and viewed in connection with subsequent endeavors to take advantage of it which manifested an entire disregard of the rights and interests of the owners of the things saved, might have precluded the recovery by the captain of the vessel whose company saved them, of any share of salvage compensation to which he would otherwise have been entitled.

4. A claim of salvors for compensation ought in this case, to have been

prosecuted, on arrival at the first port where it could have been conveniently brought before an established tribunal of maritime jurisdiction.

5. The vessel whose company saved the things, having arrived, in possession of them, at a port where such a tribunal was established, and where no adequate reason prevented a prosecution of the claim, omitted to prosecute it there, and carried the things saved to her home port which was remote from this first port of arrival and also from the known place of ownership of the things saved. Her mate and others of her crew, claiming salvage under proceedings instituted at her home port, it was held that, as her master and owners could not, under such circumstances, have recovered, the mate, though one of those who had boarded the burning vessel, could not recover. He was an officer whose capacity to institute and prosecute, independently of the captain, legal proceedings at an intermediate port of a voyage was recognized by law, and, therefore, was not exempt from the operation of the rule which would have been applicable to a claim at the suit of the master or owners.

6. The rule thus applicable to the master, owners, and mate was applied against subordinate navigators who did not leave their own vessel. An exemption in their favor could not be admitted on any principle on which exceptions from the rule would not be inconveniently multiplied.

7. But, a partial exemption was allowed, and a limited salvage compensation decreed in favor of such of her subordinate mariners as had boarded the burning vessel.

8. A libel at the suit of these mariners against the things saved from the lost vessel, and against the master of their own vessel, presented a subject of admiralty jurisdiction, compounded of that exercised in salvage cases and that exercisable for ascertaining the ownership and preventing the misappropriation of property saved or found at sea.

9. But, under such a libel process was not awarded against their own vessel or against her owners.

10. When owners of property (other than a vessel) in custody of the Court are absent and not represented, though the property may be liable to some deterioration from its retention, a sale of it will not be ordered unless it is absolutely perishable, or so chargeable as not to be worth preserving.

11. The price obtainable at a peremptory judicial sale being usually much below the fair value of the thing sold, such a sale is not legally regarded as a test of its value. An absolute sale, therefore, of property in the Court's custody will not be ordered before adjudication unless the probable deterioration in value from retention exceeds the proportion which the probable sacrifice bears to the fair value.

Libel for Salvage. The facts will fully appear in the opinion.

CADWALADER, J.

This is a case of salvage. The libellants were the crew of the barque Charlotte E. Tay, A. S. Hughes, master, on a

voyage begun on 23d January, 1858, from Philadelphia to Rio de Janeiro and back. On the 22d of February, 1858, when distant from Rio six days' sail, and from the Pernambuco coast between 300 and 350 miles, a vessel astern and to windward was descried making signals of distress, and, soon after, was observed to be on fire. She afterwards proved to be the Chilian ship Martinez Diaz, owned by Ramon Martinez Diaz & Co., of Valparaiso, then on a voyage to that port from Boston with a company of 25 persons. The Tay hove to, and waited for her to come down. At about 9 o'clock in the morning, the Chilian vessel being then about half a mile distant, one of her boats, containing her captain, second mate, and four of her crew, came alongside of the Tay. The Chilian captain came on board of the Tay and begged assistance. He endeavored unsuccessfully, by liberal offers, to induce Captain Hughes to deviate from the course of his voyage, and take them to Pernambuco, which was the nearest port. He offered to Captain Hughes, as the mate of the Tay deposes, a note or bill for $2,000 as an inducement to remain by him the rest of the day and all that night, so that he could run the ship ashore. In the relative position of the vessels to any shore, it is not easy to understand how this can have been the precise character of the proposal. Captain Hughes declared himself willing to take on board of his vessel all persons who were in the burning ship, and carry them and their personal effects to Rio, the port of his own destination. He rejected all other proposals, as his vessel, bound to a market and laden with flour, was *running against* two other vessels similarly laden. No vessel other than the Tay was then in sight. The Chilian captain acquiesced, having no other recourse. In rejecting his proposals, Captain Hughes does not appear to have acted unwisely or unkindly. On the contrary, his decision appears to have been conformable to his duty to his employers. The Chilian captain then said to Captain Hughes what the steward states to have been spoken in plain English in the following words: "He told our captain that all they wanted was their own private property, and *everything else you can save, you take it.*" As the second mate

deposes: *"The Spanish captain said to our captain that we could take all we could save from the vessel."* This appears to have been intended by the Chilian captain as an indiscriminate and unlimited bestowal of his employer's property, under his care and protection, upon the company of the Tay, as a compensation for saving the lives of himself and the other persons in the Chilian vessel, and permitting them to take out of her their own personal effects. It was, at all events, thus understood on board of the Tay. Her captain ordered her mate to go on board of the burning ship. The purpose of this order probably was that the mate should ascertain whether anything valuable belonging to her owners could be saved. The captain of the Chilian vessel then returned to her in the same boat in which he had come, taking with him the mate of the Tay. Though there is testimony that some others of the crew of the Tay accompanied the mate in this boat, the mate himself states the contrary; and the truth appears to be that he was the only person other than the six Chilians who then left the Tay. When he reached the Chilian vessel, her three hatches were on fire, and the fire and smoke were ascending from them, and her stern was on fire. He says: "It was almost suffocation." The crew, he says, "could not go below, under the hatches," but *"could go into the cabin and forecastle."* He states that they went to get their clothing, when he, thinking that *some of the sails could be saved,* hailed the Tay, and told Captain Hughes to send her boat, as the Chilian vessel's boat was not in good order. Captain Hughes then sent a boat from his vessel, manned by some of her crew, to the Chilian vessel. His orders were to cut adrift the sails and everything else worth saving. He had previously ordered his men who were to board her to sharpen their knives for the purpose. When this boat reached the Chilian vessel, her captain said to the mate of the Tay: "Now you have charge of the vessel, save all you can," and told the men that there was a new suit of sails below, but he did not suppose that they could be got at. An effort was made to reach them, but it was unsuccessful. The men from the Tay then went to work on deck and above,

and cut away some sails and rigging, which, with some loose articles, including some provisions, were saved. Several trips appear to have been made by the boats of the two vessels, those of the Chilian vessel containing the private property of her captain and crew, and those of the Tay containing such other articles as the men of her crew who boarded the Chilian vessel were able to save. All the company of the Tay except her captain, the steward, and a boy, were, at one time or another, on board of the burning vessel. The steward says: "By the time that the Chilians had put all their things on board, our mate and men were ordered on board by the captain, he saying that he would not allow them to stop any longer than was necessary to save the things of the Chilians." The mate of the Tay says that he was on board of the Chilian vessel for an hour and a half. He seems to have remained on board the whole time from his reaching her in her own boat, and to have left her in the boat of the Tay, which made the last trip between the vessels. Other witnesses depose that the time passed on board was much longer; but they are probably less accurate. In the meantime the flames had begun to spread over the deck. No actual danger appears to have been incurred by those who boarded her, though it would have been dangerous to remain longer than they were on board. Before the mate of the Tay returned to her, all the Chilians were on board of her in safety. It would have been impossible to save the Chilian vessel, whose mainmast soon afterwards fell.

The mate of the Tay says that the whole time of her detention on her voyage was from ten to twelve hours. The Chilians were taken free of charge to Rio de Janeiro and there landed in safety. They had received, before and after they were taken on board of the Tay, about as much assistance in their distress as the laws of humanity imperatively required, but certainly no more.

The Tay remained nearly a fortnight at Rio de Janeiro. No proceeding to recover a salvage compensation was instituted there. The Chilian captain, who was there four or five days, adopted no measure to reclaim his owners' property which was

on board of the Tay. This negative confirmation of the testimony that he had intended to transfer their property absolutely to the Tay's company gives to this evidence a credibility not otherwise attributable to it. I, therefore, assume that an absolute gift or transfer, so far as he may have had the power to make it, was really made.

The Tay returned from Rio de Janeiro to Philadelphia, where she arrived on or about the 23d of April. Her owners, Rutter, Newhall & Co., of Philadelphia, acting with great propriety, adopted immediate measures to find the agents in this country of the Chilian owners of the articles saved. Rutter, Newhall & Co. made no claim on their own behalf to any compensation otherwise than by suggesting that the amount due for salvage was to be ascertained. The articles which had been saved were taken, or were about to be taken, to the Custom House at Philadelphia, when the crew, becoming apprehensive that it was intended to deprive them of their share of the salvage, instituted the present proceedings. The libel was exhibited on the 30th of April, 1858, the day on which Messrs. Rutter, Newhall & Co., without any knowledge of the proceeding, began their correspondence with Boston to discover the agent of the Chilian owners.

It was a libel against the Charlotte E. Tay, and her master, and the articles saved from the Chilian vessel. The original libellants were all of the crew of the Tay except the first mate. There was orginally no allegation on the subject of the transfer by the Chilian captain of the articles saved. The libellants asserted that they were entitled to a salvage compensation, and prayed process not only against the things which had been saved, but also against the Tay and her master.

On 1st of May, 1858, no process having been as yet awarded, the libel was amended by the insertion of an allegation that the articles had been "given by the captain of the said ship to the master of the said barque as a consideration for saving said captain and his crew"; and the addition of an allegation to the effect that the libellants were entitled to extra wages or compensation "as *quasi* salvage," the articles "having

been absolutely given over to the said master of the said barque in consideration of saving the lives of the captain and crew of the said ship Martinez Diaz and carrying them to Rio de Janeiro." The libellants averred also that some of the articles saved had been used by the master of the barque in her service.

Process in personam was awarded against Captain Hughes, and process in rem against the specific articles saved. But the Court refused to award process against the vessel or her owners.

The articles saved were arrested and personal service of process was made upon Captain Hughes. He has not appeared, or intervened. The owners of the Tay have not intervened. Her first mate on the voyage in question has been since added as a party libellant. On 25th May, 1858, an agent at New York of the Chilian owners interposed a claim and answer, on the subject of which no communication can then have passed between him and his principals. This answer admitted the material allegations of the libel except those relating to the gift or transfer by the Chilian captain, as to which it alleged ignorance and required proof if it was deemed material.

The claim of the libellants to a reasonable salvage compensation has neither been disputed nor directly conceded. The Chilian owners do not appear to have been at any time directly represented in the cause, under specific instructions, or under a general authority immediately from themselves. No concession or waiver of any defence has been made on their part.

The case, therefore, should, first, be considered with reference to the transfer by the Chilian captain; and should, afterwards, be considered independently of this transfer, as the case of a claim for salvage.

The Chilian captain, of course, had no power to make a gift of what was not his own. The arrangement between the two captains was, therefore, of no effect unless it can be supported as an *agreement for compensation to salvors.*

No stipulation for a payment of money, or transfer of property, as a compensation for saving human life at sea can be recognized in a Court of Admiralty as of any effect. Inde-

pendently of this doctrine, an agreement for compensation to a salvor of *property* made at a crisis of marine peril, is never enforced in his favor unless it is reasonable; and an agreement that the salvor shall, in any case, have the *whole* that may be saved is essentially repugnant to the nature of the *salvage* contract. When property of different ownerships is involved in common peril, the whole property of a particular owner may sometimes, by way of a sacrifice for the common safety, be appropriated in discharge of the reasonable claim of a salvor to compensation for a service in the benefit of which all the owners have participated. But, in such a case, his loss, beyond his just proportion, is made good, as a general average, by a ratable contribution which may be enforced against the owners. The present case, however, bears no resemblance to one of general average. The two captains appear to have inexcusably mistaken their duties and rights. The act of the Chilian captain was an unauthorized appropriation of the articles in question; and, if it could have taken effect as intended, would have been a wrongful conversion of them by him to the use of the Tay and her company. From such an act, the navigators and owners of the Tay, therefore, can derive no benefit.

The Supreme Court, in language of the Chief Justice, have said: "In times of disaster, it is always the captain's duty to exercise his best judgment, and to use his best exertions for the benefit of the owners of both vessel and cargo, and when, from his situation, he is unable to consult them, or their agent, without an inconvenient and injurious delay, it is in his power to compromise a question of salvage; and he is not bound, in all cases, to wait for the decision of a Court of Admiralty. So, too, when the salvage service has not been important, and the compensation demanded is a small one, it may often be the interest of the owners that the amount should be settled at once by the captain, and the vessel proceed on her voyage, without waiting even a day for the purpose of consulting them. But, in all such cases, unless the acts of the captain are ratified by his owners, his conduct will be carefully watched and scrutinized by the Court, and his contracts will not be regarded

as binding upon the parties concerned, unless they appear to have been bona fide, and such as a *discreet owner, placed in the like circumstances, would have made.* If he settles the amount by agreement, those who claim under it *must show* that the salvage allowed was *reasonable and just.*" (15 Peters, 45.)

In the case from which this passage is extracted, it was the opinion of the Court that salvors who had endeavored to take advantage of an arrangement fraudulently made by a captain, at the crisis of alleged peril, without any regard to his owners' interest, had, by this conduct, "*forfeited all claim to compensation even for the service actually rendered.*" (Ib. 48.) I have recently, in the case of the Arcole, had occasion to consider the effect of extortionate bargains exacted by salvors from navigators of ships in distress or danger. In the present case the arrangement was unreasonable, if not extortionate. The subsequent conduct of the captain of the Tay has manifested a disposition to take advantage of it, with an entire disregard of the rights and interests of the owners of the things saved. The previous arrangement between the two captains, in connection with this conduct of Captain Hughes, would therefore, if he were one of the libellants, and a salvage compensation should be decreed, preclude him perhaps from recovering any share of such compensation. But his crew, and the owners of the vessel, would not, for this reason, forfeit their shares.

Had proceedings for salvage been instituted at Rio de Janeiro, the case would have been a proper one for the allowance of a moderate compensation to the *other* navigators and the owners of the Tay. The uncertainty of the available value of the articles saved is very great, as will be stated hereafter. Had the same uncertainty existed there, a certain sum would probably have been allowed, instead of a proportionate part of the things, or of their value. As no particular merit was attributable to the salvors, $150 would have been quite an adequate compensation. Of this amount, one-third would probably have been awarded to the owners of the Tay, leaving $100 for her company. The latter amount, if Captain Hughes had

been entitled to participate in the distribution, might have been divided into fifty-one shares, of which he would then, perhaps, have been entitled to twelve, the first mate, Charles Williamson, to eight, the second mate, Charles Miller, and seamen William White, Henry Strobel, Asa Quinn, Samuel Williams, John Day, and Frank, all of whom boarded the burning vessel, seven persons, each to four shares, Wm. Blankbois, the steward, who remained in the Tay, to two shares, and a boy, who remained in her, to one share.

The objection to such a decree in the case as it now stands, arises from the omission to prosecute the claim for salvage at Rio de Janeiro. The salvors, in carrying the things saved to their own vessel's home port, distant six or seven weeks' sail from the port of arrival, and remote from their place of ownership, committed an act which, if not one of mal-appropriation, was of a not less injurious effect, or tendency. Such a transportation of things which have been saved at sea from one part of the world to another, if legally sanctioned, would soon become a method of embezzlement by pretended salvors.

The right of a salvor to proceed for his compensation against the *thing* saved or benefited by the salvage service depends upon his *lien* on the subject of the service. His duties and his rights in respect of this lien must be, to some extent, reciprocal. Possession of the subject is not required in order to originate or preserve this and many other maritime liens which are enforced in Courts of Admiralty. It has been judicially said that the foundation upon which salvors are at any time allowed to retain possession of the subject of their service is to secure their demands upon its owner. (2 W. Rol. 312, 313.) A salvor in possession, therefore, holds possession for the sole purpose of enforcing his lien. Subject only to the lien, he holds the thing in trust for its owner. A wilful abuse, or violation in any material particular, of this trust, determines the lien. The breach of trust is palpable and gross when the thing is unnecessarily carried by the salvor for his own convenience to a distant port inconvenient to the owner.

Marine salvors in possession ought always, therefore, unless

prevented by some adequate cause, to proceed against the effects in their hands, without unnecessary delay, at the first port reached where a proper tribunal for the adjudication of questions of maritime salvage is established. When they are not in actual possession they may sometimes use even force to prevent the owner of the things saved or benefited from removing it from such a port. (La Bruce Marvin S. 138.) In the case of the Nicolai Henrich, a salvage service was rendered off the English coast by an English fishing lugger to a Prussian vessel bound to London. The salvors brought the Prussian vessel into Yarmouth Roads. The Prussian master, two days afterwards, got under weigh to proceed to London, upon which a warrant of arrest, in an admiralty cause of salvage, was sent off in a yawl, which overtook the Prussian vessel. The salvors had hired this yawl for the purpose and paid £10 for her hire. As the Prussian captain had removed his vessel from Yarmouth without their consent, this amount of £10 was awarded in addition to their salvage, the Judge of the Admiralty Court saying: "The salvors had a lien upon the ship, and if she had been lost on her voyage from Yarmouth to London, they would have lost their remedy." (17 Jur. 329, 22 Eng. L. & Eq. 615, 617.) In that case, the salvor might have waived his right of proceeding at Yarmouth, and have proceeded at London, because London was a port convenient to the owner of the property. So here, the navigators of the Tay, if they had permitted the Chilian captain to retain the effects saved, might have proceeded against them at Valparaiso. When the owner, or his agent, has remained in possession from the time of the service rendered, he is justifiable in removing it from the first port of arrival if there is no proper tribunal there for the adjudication of a dispute as to the salvage, to any other conveniently accessible port where such a tribunal is established. In a case in which an unreasonable demand of salvage was made upon the captain of the vessel benefited at a place which was not a port of entry, the Supreme Court said that "it was his duty to have proceeded to a port of entry, and to have brought the subject before the proper tribunal, at the same time advising

the owners or consignees of the vessel of what had happened, in order that they might have an opportunity of attending to their own interests." (15 Pet. 46.) This could there have been done in a very few days. The case is quoted because the language of the Court excludes the notion that he could have required the salvors to permit him to proceed with his vessel to her home port. In cases of belligerent capture, reasons, which do not apply to cases of salvage in time of peace, render the captor's own country the proper place for adjudication. But he must carry the captured property to a *convenient* port of his own country. He cannot select his home port where reasons of convenience in favor of another port predominate. (6 Robinson, 276-278.) Next to the security of the captured property, the *convenience* which he must principally consult is that of such professed neutrals as may probably become its claimants and pray restitution. In the case of the Wilhelmsberg (5 Robinson), Lord Stowell said that the convenience of the claimant in proceeding to adjudication is one of the first things to which the attention of the captor ought to be addressed.

The master and owners are not before the Court as claimants of salvage. But, it is proper to state that, in the opinion of the Court, the omission of Captain Hughes, as navigator of the vessel, to prosecute the claim on his and their behalf at Rio would have been an insuperable obstacle to the recovery by them of any salvage compensation here. The expression of this opinion is necessary on account of its applicability to the case of Mr. Williamson, the mate, who is a party claiming salvage. His claim is disallowed. As he was on board of the burning vessel, I have had some hesitation upon the question of disallowing it entirely, or allowing him at the rate of only a common mariner. But, I am, upon reflection, convinced that it ought to be disallowed entirely. The mate of a vessel engaged in foreign trade should be so far cognizant of maritime laws and usages as to act in port with reference to them independently of the master. The 3d Section of the Act of 20th July, 1790 (1 St. 132), recognizes him as a person capable

of acting thus independently. The command of the vessel may devolve upon him, and he must be regarded as a person qualified, or professing to be qualified, to exercise the command in case of the death, absence, or disability of the master.

It would therefore be unsafe, in a case like the present, to allow his claim when that of the master and owners would be rejected.

As to the man (Blankbois) and the boy who did not leave the Tay, the rule should, I think, be applied in like manner, so as to exclude their claims. They performed no salvage service other than that incidental to the service of the *vessel,* for which, if I am right, nothing can be allowed. As between the Chilian owners and the persons concerned in the navigation of the Tay, who did not leave her, the rights of these navigators must be determined by the acts or omissions of the principal navigator, Captain Hughes. They must share the ill consequences of his mistaken conduct, as they would have participated in the benefit of his conduct if judicious and meritorious. A different rule, by multiplying exceptions from the application of a useful principle, might be vexatious and harassing in its operation upon maritime commercial interests.

The case of the second mate and six others of the crew (excluding, as above, the first mate) who boarded the burning vessel remains for consideration. They would, upon the above conjectural estimate of the salvage that might have been allowable at Rio de Janeiro, have been entitled each to about $8.00, of which one-half would have been the excess above the share of the steward who did not leave the Tay. Under the foregoing views, I cannot allow them the full amount of $8.00 each. But, subordinate seamen are governed so much by the course of conduct of the principal navigators of a vessel, and are so little able to act independently of their superiors during a voyage, that their omission to resort at the proper time and place to legal proceedings ought to be indulgently considered when indulgence can be extended without injury to other parties. To excuse their omission in a matter which concerns exclusively their own vessel would be an indulgence injurious,

as has been stated, to other interests, which are not less entitled to protection. But, when a mariner, in the performance of a salvage service, whether acting under orders or not, leaves his own vessel at sea, the service does not concern her navigation or does not concern it so exclusively as to preclude an occasional extension of the indulgence.

Therefore, if these subordinate navigators had, as salvors, any rights which could be maintained independently of acts of the principal navigator of the vessel, the case is one in which the libel ought, if possible, to be sustained in their favor.

Now, any party having an interest in property saved, or found, or otherwise taken, at sea may invoke the exercise of admiralty jurisdiction to get it out of the hands of a wrongful possessor. To rescue such property from the possession of parties by whom it might be misappropriated, and to determine questions of title to it in suits as well against actual or pretended salvors as against other persons, was a very ancient, and is likewise a familiar modern *head* of admiralty and maritime jurisdiction. It was recognized more than five centuries ago by the Aragonese Government in a controversy between the royal judge of the city of Barcelona and the consular judges of the same city as a then existing jurisdiction of the maritime court; and it has, in the present century, been more than once recognized by the Supreme Court as an existing jurisdiction of Admiralty Courts in the United States. (Capmany Mem. Hist. Sobre Comercio Antiguo de Barcelona II, 133, A. D. 1354, 4 Cranch, 347, 15 Peters, 48, 10 Wheaton, 486, 496.)

In the present case, Captain Hughes had the possession of the things saved under a claim of property which had been impliedly asserted by him to the exclusion of the just right of its owners. The proceeding at the suit of these mariners might, therefore, have been the means of rescuing these articles from an intended malappropriation, in the prevention of which the Chilian owners were interested, in a greater degree than the libellants. We now know that the owners of the Tay had recognized the title of these Chilian owners and had adopted

measures for its protection and security. But this was not known to the libellants when their suit was instituted; and had they known it, their knowledge of it would not, in this respect, have altered the beneficial tendency of the proceeding. There was thus, therefore, perhaps, a feature of judicial salvage in the proceeding itself of which the Chilian owners could not be expected to reject the benefit, and could not, with a good grace, reject the attendant burden.

Entertaining these views, though I doubt whether more than $4.00 to each of these seven libellants ought to be awarded, I have concluded to decree $6.00 to each of them for their participation in the services rendered on board of the Chilian vessel.

The usual applications for the sale of the effects arrested have been made in this case. Their absent owners would not at first have been represented by a bidder to protect their interests; and I cannot, as yet, learn whether they would be so represented if an order of sale were made now. A judicial forced sale is no legal test of value. Practically, it is often, if not ordinarily, the means of effecting a sad sacrifice. In the present case, the articles are not perishable in any other than a contingent and relative sense. Their deterioration during nine months was insignificant compared with the sacrifice that would probably have been attendant upon such a judicial sale as I was requested to order. I was, moreover, unable to arrive at an approximate estimate of their probable value. They were appraised in May, 1858, at $402. According to an allegation in the libel, the sails alone had been declared by the master of the Tay to be worth $1,500. This allegation has been sustained in one of the depositions. In January, 1859, upon a suggestion of perishableness and liability to deterioration, a commissioner was appointed to survey and examine the things, and report their true condition, and whether they *had* suffered by deterioration, or were *liable* to injury from detention, and to what extent. He reported without making the statement whether they *had* suffered by deterioration, but merely expressed his opinion that the interests of all concerned required a speedy sale, as the articles were *liable* to great de-

terioration and depreciation, and *liable* to be destroyed by rats and mildew. On questioning him orally in Court, whether there *had* been any mildew or injury from rats, or other apparent deterioration, I could not learn that any had been observed. The marshal is responsible if they suffer, in these respects, from want of proper care. Before deciding upon the course to be pursued, I asked the commissioner to state approximately, as well as he could, the value of certain articles which he had examined, comprising about three-fourths, in value, of those which had been appraised in May, 1858. These articles, according to his answers, were worth, at the *lowest* prices, *other* than those of a forced sale, $765. The appraisers had valued them, in May, 1858, at $298. According to the ratio of this difference, the articles appraised in May at $400 were in the following January worth, at low prices, more nearly $1,100. There was no suggestion of any change in the market price. The former appraisement was much more likely to have been accurate, if the proper standard had been adopted by the former appraisers. But, the difference excited an apprehension lest their standard might have been solely that of the prices which the property would have probably brought at a forced judicial sale. Independently of the general danger of sacrifice at such sales, a combination might, in this case, have been made against the interests of absent parties not represented at the sale.

In the cases of *vessels* in the custody of courts of admiralty, when they are not likely to be soon discharged upon stipulation, the reasons which induce orders of sale are peculiar. They are founded upon the chargeableness, and great liability to deterioration, of a vessel idle in the port, and upon the great loss, public and private, resulting from her non-employment. But, neither the rule nor its reasons apply to property of the description of that in custody here.

I, therefore, stated that I would not order a sale without another commission of survey and appraisement; adding that if such a re-survey should be applied for, the commission should contain special directions to regulate the course of the commis-

sioners in making the new appraisement. No application for a re-survey was made.

This case, as to the sale of the articles, was, originally, a peculiar one in the circumstance that the mode in which the articles had been brought within the Court's jurisdiction had been such as might have precluded their owners from following and tracing them to this port. But the refusal of the order of sale was not placed by the Court upon any such narrow view of the question. As a general and notorious truth, it may be said that Courts of Admiralty in all parts of the world have too often been made auctioneers for the negligent sacrifice of the property of absent owners which the casualties and vicissitudes of navigation and foreign trade have cast upon their judicial custody. No caution to prevent such sacrifices can be excessive or inappropriate.

In the case, as it now stands, if the property should not be redeemed, on behalf of its owners, by the payment of the salvage decreed in all $42, a reappraisement will be ordered with certain directions as to the mode of making it. Upon such a reappraisement made and approved, an absolute sale would be immediately ordered of any subjects of the appraisement for which any party interested or any stranger would agree to bid two-thirds of the valuation, the sale to be continued until the proceeds may suffice to satisfy the decree. If no person should agree to bid two-thirds of such valuation for any of the articles, a conditional order of sale adapted to the state of the case will be made.

Judgment that the libel be taken as confessed has not, as yet, been entered against Captain Hughes. Until after such a judgment has been entered, or such other order as to him as may be deemed proper shall have been taken, I reserve the question of his personal responsibility for the difference between full salvage and the amounts awarded to the libellants, and of his liability for the costs of the cause.

The delivery of the foregoing opinion has been suspended, at the request of counsel, in order that a responsive allegation

might be interposed by the owners of the Tay, on their own behalf, and on that of her master, who is, as I am informed, absent. This allegation is now presented, and has been read and filed. It does not alter any of the views which the Court has expressed.

DISTRICT COURT. APRIL 28, 1859.

CRIMINAL LAW.

THE UNITED STATES *v.* VONDERSMITH

1. Under an indictment for forgery evidence of kindred transactions may be introduced to illustrate or establish the intent.

2. A jury in a criminal case may judge of the law as well as of the fact; but it is the office of the Court to expound the law to the jury who have, in general, no other standard of law which, as good citizens, they can desire to follow than the opinion of the Court.

3. Several papers and parts of papers necessary in the establishment of a claim for pension, were forgeries uttered in support of a claim wholly fictitious. *Held*, that a general description of their character and object as one paper is not insufficient or inaccurate.

4. A designation of a forged paper as "a certain writing" is sufficient even in a case where the indictment is under a statute in which the instrument is named.

5. It is not a valid objection to an indictment in a forged attestation to pension papers that it is not the entire paper, but a part only, the effect of the whole being stated by way of inducement. But where there is another indictment alleging the paper as a whole, the defendant cannot be convicted on both.

6. The forging of the name of the appointor to a power of attorney and afterwards filling in the name of the appointee, constitutes the offence of procuring a forgery as distinguished from forgery.

7. The limitation of a prosecution for forgery in the Act of Congress of 30th April, 1790, is two years, within which time an indictment must be *found* or an information *instituted*, exclusive of the period during which the defendant may have fled from justice.

8. Where the defendant's flight occurred on the same day of the same month as the performance of his last act in the forgery two years before, the prosecution would be barred, except where by comparison with other periods of limitation in the same act it appeared to be the intention of the legislature to include within them the last day.

THE DEFENDANT, Judge Vondersmith, was tried under several indictments, for forging pension papers, a species of

transaction in which he appears to have been engaged for a number of years. THE COURT charged the jury as follows:

CADWALADER, J.

An act of the Congress of the United States, passed on 3d March, 1825, made it felony to forge, or cause or procure to be forged, any paper, writing, or instrument in imitation of, or purporting to be, any letter of attorney, or other authority or instrument, to receive any pension due or to become due from the United States, or the name or names of any person entitled to any such pension. An act of 3d March, 1823, had already made it felony to forge, or cause or procure to be forged, not only a power of attorney, but also a certificate or other writing, for the purpose of obtaining or receiving, or of enabling any other person or persons, either directly or indirectly, to obtain or receive any sum or sums of money from the United States, or any of their officers or agents. This act likewise makes it felony to utter or publish any such forged writing as true, with intent to defraud the United States, knowing it to be forged; and also makes it felony, with such intent and knowledge, to transmit it to, or present it at, or cause or procure it to be transmitted to, or presented at, any office or officer of the Government of the United States.

The defendant is charged, under these acts, with having forged, or procured to be forged, uttered as true, and transmitted to the office of the Commissioner of Pensions, pretended applications in the names of non-existing persons for money alleged in them to be due for pensions to widows and children of officers and soldiers of the Revolutionary War, supported by pretended affidavits which the pretended deponents and subscribers never deposed or subscribed, and by certificates which the pretended attestants never subscribed or saw. In legal proceedings, the presumption is always in favor of innocence rather than of guilt; and, in proceedings for criminal offences, the party accused is entitled, under this presumption, to the benefit of any reasonable doubt of his guilt that can be honestly entertained. If the proof to sustain the present prose-

cution had rested upon the testimony concerning the making by the defendant of applications in the names of non-existing persons, in the particular cases in which it is charged in the indictments, a doubt whether he had not been himself imposed upon by some deceitful party personating the supposed applicant might perhaps have been suggested. For this reason proof has been given, in support of the prosecution, of transactions of the same character, composing a series, in which the cases in question are included. This proof has been adduced in order to show that, from their multiplicity, they cannot have occurred innocently. In the language of the Supreme Court, when the question to be tried is one of fraudulent intent, "it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment. Indeed, in no other way would it be practicable, in many cases, to establish such intent or motive, for the single act taken by itself may not be decisive either way; but when taken in connection with others of a like character and nature, the intent and motive may be demonstrated almost with a conclusive certainty." (16 Pet. 360.) It had been decided previously by the House of Lords in England, in a case in which the opinion of the Judges was taken, that, when the question in issue was whether a defendant knew that the name of a non-existing party to a paper was fictitious, his knowledge could be shown by proof of numerous other cases in which he had acted upon similar papers in the names of non-existing persons, under circumstances precluding a reasonable belief that he could, in so many cases, have been ignorant of the truth. (2 H. Bl. 288.) In cases of prosecutions for forgery, the question, in different forms, has often been presented for decision. There never has been a case, perhaps, in which such testimony was more proper than the case which you are to determine. Some of the transactions proved are, it is true, remoter in date from the transaction in question than those of which proof has been given in other cases. But their uniformity, identity of

purpose, and connection as a series, has been established so as to render this, in the opinion of the Court, an immaterial distinction as far as the mere admissibility of the evidence is concerned. But this evidence, except on the question of guilty intention alone, is entitled to no consideration, where it is not applicable directly to the particular cases of alleged forgery charged in the indictment.

On the part of the prosecution, proof has accordingly been made of a series of forgeries, consisting in the preparation and presentment of fictitious writings, in order to obtain pension certificates to non-existing persons, receive pretended arrears of pension money, and draw pretended accruing pensions to such fictitious persons. The system through which these frauds were practiced appears to have been to ascertain, in every case, the name of an officer or soldier of the Revolutionary War to whom no pension had, as yet, been granted; to forge, in every such case, a certificate, purporting to be sworn by the pastor of a church, of the registry of the marriage of the officer or soldier; to forge affidavits of the military services of the officer or soldier during the war, his marriage, and his death, of pretended reasons explaining the delay in presenting the application, and of such other pretended facts as were thought necessary to support it, and forge also such official attestations of local magistrates, as acts of Congress, or the regulations of the pension office prescribed. In most of the cases, the pretended applicants were described as the widows of the respective officers or soldiers. In the other cases, the forged affidavits had stated the deaths of the respective widows, and the pretended applicants were described as children of the respective officers or soldiers. In this manner, certificates, in one form or the other, in favor of the fictitious applicants, were obtained from the Pension Office at Washington in more than twenty cases. The forged papers appear to have been in the handwriting of the defendant, or in that of copyists employed by him for the purpose, in all of the cases except two or three, in which his privity has been shown in other modes. After the official certificates had been thus obtained from the Pension

Office, through the forged papers, the forgeries were, in another form, repeated, as the subsequent instalments of supposed quarter or half-yearly pension money were to be obtained from the Pension Agency at Philadelphia. Forged powers of attorney, to receive the respective amounts, with forged certificates of acknowledgment, accompanied by forged affidavits of the pretended pensioner, with forged jurats, were brought or forwarded to the Pension Agency. The forged affidavits contain in each case a copy of the certificate for the supposed pension, which had originally been obtained from Washington. These forged affidavits, and also the forged powers of attorney, were, according to the testimony, in the defendant's handwriting in every case. If there had been any defect in the proof of his privity to the forgeries through which the pension certificates had been obtained, in the two or three cases in which the original papers had been in a different handwriting, these later forgeries, which are distinctly proved to be in his handwriting, supply any link in the chain of testimony which might have been wanting. The pretended powers of attorney, as I have said, are all in his handwriting. In some of them he was named as the attorney to receive the pension; and there is proof that he received some of the amounts with his own hand. A particular form of oath was required before an attorney could receive a pension. An act of Congress of 22d February, 1840, authorized the local pension agent, and an act of 19th of February, 1849, authorized his deputy or clerk, to administer this oath. In the cases in which the defendant received the amounts with his own hand, he, in person, took this oath. In the other cases, the money was collected through the agency of banks. The usual course, and that pursued in these cases, when the money was collected through banks, appears to have been to leave the name of the attorney in blank. The power, in this form, was taken by a messenger of the collecting bank to the pension agency, where the messenger took the affidavit, and received the money. The name of this messenger, as attorney, was inserted in the blank in the power, at the time when the payment was thus made. The

subsequent receipt by the defendant, through a bank at Lancaster, of the money collected through these powers by the bank messengers in Philadelphia, has been traced, in some of the cases, by evidence of which the effect has not been disputed; and the jury will probably think the proof extremely clear that he knew how the business was conducted by the collecting banks, and that he prepared the powers purposely in blank that the blanks might be thus filled.

According to the testimony, more than $40,000 was fraudulently obtained from the United States by the defendant, in sums varying from very small to quite large amounts, in the names of fictitious persons, by means of these forged papers. The last appearance of any of these fictitious names in the Pension Office was in connection with the semi-annual payments of pensions in September, 1853. Before the next semi-annual day of payment the present prosecution had been commenced. It was begun on the 7th of February, 1854. The defendant gave bail for his appearance in this Court. He was to appear on Monday, the 29th of that month. On the night of Sunday, the 19th, according to the testimony of Dr. Leonard, the defendant left his residence at Lancaster, where he then held an important public employment. He did not return for between two and three years, during which time, according to the testimony of one or more of the witnesses, he was in Europe. The proof, in law, that this was a flight from justice, is ample, if you should believe, as you probably will, that it was, in fact, such a flight. When a party charged with a crime is not in actual confinement, a fleeing from justice cannot ordinarily be proved in any other manner than that in which it has been proved here. The proof that he thus absconded would, if the case had been a doubtful one as to his guilt, have been evidence against him entitled to your consideration. But you probably will think that the more direct proof of his guilt, of which I have said something, and will say something more presently, is too decisive to require any such support. The circumstance of his flight will, however, become important when we come to consider the question of limitation of time.

Of the series of cases of which the details have thus been given in evidence, two have been made the subjects of the present prosecution. They may be designated as the cases of the pretended widow of William Russell, and the pretended children of Andrew Lytle. I will call them respectively the Russell Case and the Lytle Case. That no such persons as the pretended applicants or supposed pensioners existed has been very distinctly proved, and that the papers were all forgeries has been proved not less clearly. The proof has not been of an uncertain or indirect character, like that of mere difference, or want of resemblance, in handwriting. Such testimony is often unsatisfactory. But, in the present case, the original papers have been laid before the living persons whose signatures to the attestations were forged. These persons have, on oath, sworn, without any qualification or doubt, that the signatures are not their own. It is impossible that they can have been mistaken. All doubt upon the subject, if there could have been any, must, however, be removed by the circumstance of the absolute forgery in every one of the twenty or more cases of the marriage certificates on which the applications were founded. The existence and identity of the pretended applicants depended, of course, upon these marriages. In the two cases which are the subjects of the indictments, besides this proof of the falsity of the marriage certificates, the attestations of the judges and aldermen, and the certificates or depositions of the pretended ancient witnesses, are directly proved to have been forged. Surviving members of the family of the soldier or officer in whose right the pretended claim was made have testified to the actual falseness of the respective names of the pretended widow and children. In these and in some of the other cases of the series an amount of proof has been accumulated such as probably was never before adduced applicable to transactions so numerous.

The tendency of this proof has been simple, direct, and uniform. Besides the proof that, in hundreds of cases, the signature of his name to the attestation of the forged papers as a witness is in his own handwriting, and that hundreds of them

are bodily in his handwriting, the official signatures of aldermen and judges of the city and county of Lancaster, where he resided, of the pastor of his own church, of inmates of his household, of his relations and his friends, as well as of persons who probably were strangers to him, are proved to have been forgeries; and he afterwards, in various modes, acted upon the forged papers by transmitting them to the Pension Office, and receiving the instalments as they from time to time fell due.

The Russell Case, as I have called it, is the subject of four indictments, which were found on 4th March, 1854; the Lytle Case, of two indictments, found on 16th March, 1854. The defence has been pressed principally on technical points, upon which the jury will probably desire to be governed by such opinion as I may, after consideration, have formed. A jury in a criminal case may judge of the law as wel as of the fact. But it is the office of the Court to state and expound the law to the jury, who have, in general, no other standard of the law which, as good citizens, they can desire to follow, than the opinion of the Court. The points, as I view them, except so far as the question of limitation of time is concerned, will depend in a great measure upon questions arising upon the face of the indictments. One of these questions, however, will involve a point on which the jury will be required to pass as matter of fact, though the evidence upon it is of so distinct a character that its determination by them will probably be attended with no difficulty.

The first of the indictments to which I will ask your attention (February Sessions, 1854, No. 13) is that in which the defendant is charged, in the first count, with forging and procuring to be forged the papers which accompanied the original application in the Magdalena Russell Case, all dated in November, 1846, purporting to be her affidavit of service of her husband, William Russell, in the Revolutionary War, of their marriage, of his death, and of the reasons which had delayed her application—with a jurat before Judge Shaffer, and an attestation by him of her credibility, a certificate on oath by

four attestants of the material facts in her affidavit, with a jurat before the same judge, and his attestation of their character, and a certificate purporting to have been sworn before Alderman Evans, by the Rev. John C. Baker, of a register of the marriage of William and Magdalena Russell, for the purpose of fraudulently obtaining pension money to Magdalena Russell, no such person being then in existence. He is charged in the second count of the indictment with transmitting to the Pension Office, and in the third count with uttering, the same writing or writings. The objection made to this indictment is, that the character of the writing alleged to have been forged is not sufficiently described in it. The indictment sets the fictitious papers forth according to their tenor, after describing them as "a certain writing and writings purporting to be signed and executed by the parties whose signatures are thereto affixed, and which *certify to and pretend to establish the existence of a certain Magdalena Russell as a pensioner* of the United States." This is not on its face an *inaccurate* description of the papers. If they had been genuine, they perhaps could not have been thus made collectively the subject of a single count for forging, though the objection would not have applied to the counts for transmitting and uttering. But, as papers in a case wholly fictitious, and themselves wholly fictitious, and all forged by the same hand for the same purpose, they might be regarded as constituting, together, either a single paper or several papers. The evidence in this respect might not support such an indictment. But an objection to it could not be sustained upon its face. Then, if the writing is not *misdescribed*, we recur to the question whether it is *insufficiently* described. A conclusive answer to this objection is that there was no necessity to describe its character at all.

The form of an information for forgery at common law is in Ward's Case, 2 Lord Raymond, 1461, and 3 Lord Raymond, 358, which is also in the Crown Circuit Companion, and in Chitty's Precedents of Indictments. It was a prosecution for endorsing upon a certain certificate in writing, by which the defendant was obliged to deliver a certain quantity of

alum to the Duke of Buckingham, a forged order from the Duke for the purpose of avoiding its delivery. The subject of the alleged forgery was designated as "a certain writing in the words and figures following," without any other description, and the case, after great consideration on other points, resulted in a conviction. The objection that the paper was not sufficiently described was not even taken. It could not have been taken, because the Court could judge of the character of the writing from its contents, whether the indictment gave it a name or not. But it is suggested that when the indictment is upon a statute making penal the forgery of a certain instrument by name, it must be described by the name given to it in the statute.—Mr. Chitty seems to be of the contrary opinion. He says, "Though it is *sufficient* to aver that the defendant forged a certain writing, describing it truly, and setting forth its tenor, it seems *more proper* to lay it as a certain paper writing, purporting to be the instrument which the statute on which the indictment is framed, describes."—This is cautiously expressed so as to avoid the intimation of an opinion that such a designation by name of a paper of which the contents are fully set forth, can ever be a matter of legal indispensable necessity. But, supposing that a case might occur in which the use of the descriptive name contained in such a statute would be necessary in an indictment, such a case cannot be presented under a statute like the act of Congress of 1823, in which the words "or *other writing*" form a part of the legislative description of the subjects of certain forgeries defined with a view to their purpose, rather than their character.

In the present case, if a description were necessary, the descrptive words in the indictment would suffice. The indictment is, I think, well drawn. It fulfils the substantial conditions of describing the offence charged so as to show its legal character, and of describing it with such certainty that the offence of which the defendant might be convicted or acquitted would afterwards be known.

The next indictment which will be mentioned (February

Sessions, 1854, No. 14) contains three similar counts, except that their only subject is the forged attestation, by Judge Shaffer, of the credibility of the fictitious Magdalena Russell.

Of this paper the indictment contains a very precise description, to which no objection has been made. One objection taken is that it is not an entire paper, but a part only of the papers attested. This objection cannot prevail. The question is on the face of the indictment. The other papers might all have been genuine—that is to say, not forged—and yet have wanted the credibility which this attestation would have given to them.

The attestation might therefore have been the subject of an independent forgery. But then it is objected that if this were so the papers of the applicant whose credibility was attested ought to have been set forth in the indicament. This would be a very unreasonable and inconvenient rule. In Ward's Case, the certificate on which the forged endorsement was made was not set forth. It was described by words of reference only, with less particularity than in this respect has been observed in the indictment in question. The objection was taken that it was not shown *how* the defendant was chargeable to deliver the alum in the within written certificate. But the answer was that this was only matter of inducement, which need not be shown; and of this opinion was the Court.

There is nothing, therefore, in the objections to the indictment. But as the attestation of Judge Shaffer is also given as part of the subject of the forgery alleged in the other indictment, I am of opinion that though, independently of the question of limitation of time, he might be convicted on either of the two indictments, he ought not to be found guilty on both. But the view taken of both indictments on the question of time will render this opinion immaterial.

The next indictment which will be mentioned (February Session, 1854, No. 8) is for forging, and procuring to be forged, a writing purporting to be a letter of attorney from Magdalena Russell, authorizing Dennis Driscoll to receive her pension from September, 1852, to March, 1853, and pur-

porting to be acknowledged on the 4th of March, 1853, before Alderman Evans, for the purpose of receiving from the United States money pretended to be due to her, no such person being then in existence. Another indictment (February Session, 1854, No. 7) contains a similar charge of forging, and procuring to be forged, her power, made on the 5th of September, 1853, authorizing the receipt of her pension from the 4th of March to the 4th of September, 1853.

The objection to these two indictments arises upon the fact, which does not appear upon their face, that when they were written by the defendant the name of Dennis Driscoll was not in either of them. He was one of the runners or messengers of a bank in Philadelphia, which collected the pensions for a bank at Lancaster in the mode already explained. The objection is that the power in each case as forged by the defendant was in blank and did not purport to be a power to Dennis Driscoll, and that it is therefore misdescribed in the indictment.. The evidence is that the power in each case was drawn by the defendant in the name of the pretended pensioner, who was a non-existing person, in order to defraud the United States of the money described in it as her pension, and that a blank was purposely left for the future insertion of the name of the agent, which it was intended by him should be filled, as it was in fact filled, at the time of receiving the money from the pension agent of the United States. If the jury shall so find, as probably they cannot but find, from the evidence which is uncontradicted, the defendant was in law guilty of the offence of *procuring* the powers of attorney, to be forged in the manner described in these indictments. It might, perhaps, be said that he was legally guilty, not only of procuring them to be forged, but of forging them as described in the indictments, or that the two charges are in effect the same. (See Elizabeth Dunn's Case, 2 East's C. L. 976, Polhill & Walter 3, Barnw. & Adolph, 121 to 124.) But I do not so state the law. The act of Congress makes it felony to procure such a paper to be forged, as well as to forge it; and I place my instruction on the particular ground that if you find the facts which the evidence

tends, as I have stated, to prove, the defendant is guilty of *procuring* these powers of attorney to be forged.

The two remaining indictments (Feb. Sess., 1854, Nos. 24 and 25) are those in the Lytle case. One of them (No. 24) is for forging, and procuring to be forged, a paper purporting to be John Lytle's affidavit sworn on 9th February, 1852, in order to obtain a pension for himself and Cyrus Little, setting forth the services of their father, Andrew Lytle, in the revolutionary war, his marriage to their mother, Margaret Lytle, the deaths of Andrew, and afterwards of Margaret Lytle, etc., with a jurat before Judge Long, for the purpose of obtaining pension money from the United States, no such person as John Lytle being then in existence. There is a second count for transmitting, and a third for uttering the same writing. It is described as "a certain certificate and writing purporting to be signed and sworn to before and in the presence of H. G. Long, the President of the Court of Common Pleas of Lancaster County, whose name is thereto annexed." It is set forth according to its tenor. The remaining indictment (No. 25) is composed of three similar counts, the subject being a forged separate attestation by Judge Long, of the fictitious John Lytle's credibility.

These two indictments do not, in their character, or purpose, differ from the two indictments as to the original papers in the Russell Case. But, in the Lytle Case, all of the papers, except the pretended affidavit of John Lytle, were in the handwriting of an amanuensis, employed by the defendant for the purpose. The portion of the papers not in the defendant's handwriting have not been made the subject of these indictments. The paper in the defendant's handwriting has the jurat of Judge Long. But the forged certificate of the pretended deponent's credibility, by the same judge, is not, as it was in the Russell Case, contained in each indictment. In the Lytle Case this paper is the subject of a separate indictment, but it appears in this indictment only. Consequently, if the limitation of time were out of the way, you could find a verdict for the United States on both indictments in the Lytle Case, instead

of being able to do so on one of them only, as in the indictments upon the original papers in the Russell case.

The objections made to the indictments in the Lytle Case, have been disposed of in considering the objections to the indictments in the Russell Case. The indictments in the Lytle Case would not be liable, however, to some of the objections which were made in the Russell Case, even if those objections had been sustained.

On the whole, I think that the indictments are not only technically sustainable, but are drawn with skill. I say this because they were prepared by counsel who has not been present during the trial. I may add that they have the merit of conciseness, which, when pleadings are sufficient, is a great merit. I have considered them fully because they have been criticised with freedom, if not with severity, in the course of the cause.

If the cause had rested here, the jury would, probably, have had little difficulty in finding the defendant guilty on five of the six indictments.

But a question as to the limitation of time for the prosecutions remains to be considered.

The act of Congress of 30th April, 1790, provided for the punishment of certain crimes defined or specified in it, some of which were, and others were not, made capital offences. The offences made capital were treason, wilful murder in places within the exclusive jurisdiction of the United States, certain crimes, including murder committed on the high seas defined in the act as piracy, forging public securities issued in the name of the United States, and the forcible rescue of persons convicted of treason, murder, or any other capital crime. The 32d section enacts "that no person shall be prosecuted, tried, or punished for treason or other capital offence *aforesaid*, wilful murder or *forgery excepted*, unless the indictment for the same shall be found by a Grand Jury within three years next after the treason or other capital offence *aforesaid*, shall be done or committed; nor shall any person be prosecuted, tried, or punished for any offence, *not capital*, nor for any fine or forfeiture under any penal statute, unless the indictment, or

information for the same, shall be found, or instituted, within two years from the time of committing the offence, or incurring the forfeiture aforesaid; provided that nothing herein contained shall extend to any person or persons fleeing from justice." The Supreme Court has decided that the limitation of time for the prosecutions for fines or forfeitures under the latter clause of the act extends to prosecutions for penalties afterwards created. (2 Cranch, 336.) The limitation of two years for the prosecution of offences *not capital* must extend, therefore, to offences afterwards made the subject of criminal prosecution. Prosecutions for these offences are provided for in the same sentence, and by the same words, as fines and forfeitures. Therefore the limitation of two years in the act of 1790 includes the offences not capital which were made felony by the subsequent acts of 1823 and 1825, unless offences of the denomination of *forgery,* though not capital, are excepted by the words of exception in the prior clause of the act of 1790.

This prior clause differs from that which was the subject of consideration by the Supreme Court, in the introduction of the word *aforesaid,* which is twice used. Literally the wilful murder and forgery which are excepted from the limitation in this prior clause, are such wilful murder and forgery only as had been made offences in prior parts of the act. An exception ordinarily does not include a particular subject not embraced in the definition of the general subject out of which it is taken. Nevertheless if this had been an act of a legislature of one of the States of our Union, having a system of criminal *jurisprudence,* and likewise a general power of *legislation* as to crimes, I should think that this exception of wilful murder and forgery designated the whole classes of offences embraced in those respective denominations, and that the legislative meaning of the words was that there should be no limitation of time for prosecutions of *such* offences. Many reasons on the face of the act for such an interpretation of it might be suggested, and the word *aforesaid,* as used in it, might, under such a system of government, be reconcilable

with such an interpretation. But whatever opinion may have prevailed in Congress at the date of the act of 1790, there is no federal *jurisprudence;* and, therefore, no offence against the United States could *legally* constitute a crime until made such by an act of *legislation.* We are bound to presume that the act was passed with a knowledge, in this respect, of the law. A mistake of law cannot be imputed to legislators unless it is apparent in the language of their legislation, and even when their language seems to indicate it should never be imputed without extreme caution. In the present instance, no such mistake on the subject is apparent; and, therefore, none should be imputed. Now, neither the crime of wilful murder nor that of forgery, as an offence against the United States, could be cognizable as a capital offence *aforesaid,* unless it had been provided for in this act, because it was the first act in the federal code of *criminal* legislation. Supposing, therefore, that the question could be relieved, as possibly it might, of the effect of the single word *capital,* I do not see how the word *aforesaid* in this clause of the act can be safely disregarded.

With great doubt upon the subject, in the absence of all pertinent authority except the single decision in 2 Cranch, which has been mentioned, I instruct you that the limitation of time contained in the act of 1790 applies to the crimes in question, which are made felonies, but not capital offences, by the acts of 1823 and 1825.

But if you believe, as you probably do, that the defendant *fled from justice,* on the 19th of February, 1854, the time between this date and the finding of these bills of indictment in the next following month of March, should be disregarded. The counsel for the prosecution have asked me to instruct you that under the words of the Act of 1790, you can go back still farther to the 7th of February, when the defendant was first arrested by the deputy marshal, which they say was the time when the prosecution was instituted. The words of the act in the clause in question are, unless the *indictment,* or *information* "shall be *found* or *instituted* within two years," etc. But I am of opinion that the word

instituted applies to the proceeding by *information*, and the word *found* to a proceeding by *indictment*. This opinion is confirmed by a recurrence to the phraseology of the prior clause of the act. Consequently, I do not think that the prosecution can go back to a date prior to that of the defendant's flight on the 19th of February, 1854. I advise you, therefore, if you view the evidence as I do, to take this date as the time.

Under these views the prosecution under the two indictments upon the original Russell papers, is barred by lapse of time. The two indictments upon the subsequent Russell powers of attorney of the year 1853, are not in any manner affected by lapse of time. The two other indictments, which are those in the Lytle Case, require more particular consideration. As to the papers mentioned in these indictments, no act of the defendant appears to have been performed in *this* district after the 19th of February, 1852, when they were transmitted by letter to Washington. His flight, according to the testimony which I have already quoted, occurred on the same day of the same month, in the year 1854. Unless the 19th of February, 1854, was "within two years from" the 19th of February, 1852, in the sense in which the words of limitation are used in the act of 1790, the prosecution under these two indictments is barred. I should have had no doubt that an indictment found on the second anniversary was too late, if it had not been for the contrast of the phraseology in the two clauses of the 32d section of the Act of 1790. The prior clause bars prosecutions in certain cases, unless the indictment is found "within three years *next after* the" offence committed. The subsequent clause now in question bars the prosecution unless the indictment is found *within two years from* the time of committing the offence. If either phaseology had been adopted in both clauses, the prosecution would be barred. The only question is, whether the *contrast* in phraseology warrants a distinction which, in the interpretation of this act, would, under one of its clauses include, and, under the other clause ex-

clude the anniversary. This would be contrary to established rules for interpreting statutes of limitation. (See 5 Barnw. & Alders, 215; 3 Brod. & Bingh. 227; 10 Serg. & Raw. 211; 1 Watts, 17; 3 Harris & McH. 258, 289, 294, 297, 301, 317; 5 Cranch. Circ. Ct. Rep.) Such statutes are so construed that the application of their several clauses may, if possible, be uniform, notwithstanding variances in their phraseology. I am, therefore, of opinion that the prosecution under these two indictments is barred.

According to these views of the law, your verdict on four of the indictments will be for the defendant. Upon the two others (Nos. 7 and 8) you are to find the facts of which you are the sole judges. If you adopt the views which the Court has deduced from the evidence, you will find the defendant guilty on these two indictments.

The jury found a verdict of guilty on these two indictments, and of not guilty on the other indictments.

DISTRICT COURT. MAY 17, 1859.

ADMIRALTY.

THE UNITED STATES *v.* LINDSAY AND CUNNINGHAM.

1. A seaman questioned the propriety of an order of the mate, but offered no resistance to its execution, whereupon the mate struck him a blow on the temple with a belaying-pin. *Held*, that under the act of Congress of 3d March, 1835, malice might be inferred from such a blow.

2. Ordinary work about a vessel, although severe, is not in the nature of cruel and unusual punishment when ordered by a master to be performed by the seaman who had recently received the blow, even though such work may have a tendency to aggravate the wound, unless the intention of punishment be apparent.

CADWALADER J., CHARGED THE JURY.

The indictment is for two distinct offences. One charge is, that the defendants maliciously, and without any justifi-

able cause, beat James McGlathery, one of the crew—the other that they inflicted cruel and unusual punishment upon James McGlathery. The infliction of cruel and unusual punishment as a distinct offence, is charged against the defendant, Lindsay, alone.

As to the charge of beating, the case lies within the narrowest possible compass. McGlathery disobeyed an order given to him by the defendant, Cunningham. Bishop's evidence, and indeed McGlathery's own evidence, prove this very distinctly. It appears that instead of obeying the order, he twice undertook to judge for himself, whether there had been any occasion for such an order; and there is evidence that previous acts of slight insubordination of a somewhat similar character had occurred on his part. The disobedience which occurred when the blow in question was struck, was not the less a breach of discipline, because the order given may have been unnecessary. The case would have justified an immediate act of suitable chastisement of such a kind as might have brought this insubordinate young man, McGlathery, to a sense of duty. But, the defendant took a belaying pin, which was at hand, and struck McGlathery on the temple, a blow with it which knocked him down, and left him for a short time—one of the witnesses says a minute—insensible. It was not a blow which, if struck upon another part of his person, would have been dangerous. But, struck with such an instrument, on the head, it was a dangerous blow.

Had this blow been struck on a part of McGlathery's body, where it would not have been dangerous, or, had it been struck upon the head at a crisis of impending revolt or mutiny, or, under such circumstances of resistance of authority by McGlathery, or of insubordination of the ship's company, as might have justified an apprehension that revolt or mutiny would be the result of hesitation or forbearance on the part of the defendant, I should recommend you to find him not guilty. At a crisis of danger arising from any such cause, the master and officers of a vessel have a discretion,

with the exercise of which it would be unsafe to interfere. The security of lives and property on board of a vessel depends upon what may be done at such a crisis by the officers; and, if they act honestly, their conduct ought not to be closely scrutinized.

But in the absence of any such danger, a mere act of insubordination by a single seaman, without an actual resistance of authority, does not excuse the infliction of a blow on the head with an instrument like that used on this occasion. The act of Congress upon which the indictment is framed, requires that, in order to sustain the prosecution, the blow should have been struck, not only without a justifiable cause, but also from malice, hatred, or revenge. There is no sufficient proof of revenge, or hatred, and no sufficient evidence of *malice*, except the proof of the blow itself, struck, as it was, on the head, under the circumstances which have been mentioned. The words *hatred* and *revenge* used in the act of Congress require no technical definition, But *malice* is, to a certain extent, a legal term. A wilful act for which there has not been any legal justification or excuse, if injurious to the person of a fellow-creature, is within the legal definition of a *malicious* act. A mere *excess* of punishment in enforcing the discipline of a ship, unless under circumstances of extreme aggravation, does not suffice to show malice. Where, however, the question is not upon the *degree* of punishment, but upon its *character*, the *illegality* of its character may bring it within the legal definition of *malicious*.

This is the result of judicial decisions upon the construction of the act of Congress. I am of opinion, that in the absence of any resistance, or apparently intended resistance, of the authority of an officer of the vessel, a blow struck by him, with a handspike, upon the head of an insubordinate seaman, is an act *absolutely* illegal, and therefore, in law, *malicious*.

As regards the defendant, Lindsay, who was master of the vessel, there is no evidence to warrant a verdict of guilty. He is not in any manner shown to have been privy to the

striking of the illegal blow by the mate. Whatever may have occurred under this head was done by the mate alone, without, so far as appears, the participation, or even the knowledge, of Captain Lindsay.

The other charge of *cruel* and *unusual* punishment is not sustained by the proof. The specification of the charge is that when McGlathery had recovered from his hurt, and reported himself ready for duty, he was ordered by Captain Lindsay into the hold to break and pick the coal, which was in lumps, and had been mixed with the sand ballast, and to fill, and perhaps do some other work at, the coal barrels. That this was not *unusual* work, appears from the evidence that others of the crew, including the second mate, had been occasionally at work in the hold, and some of them at similar work, for an equally long period. The only grounds on which it has been attempted to sustain the prosecution on this point are, that there were mosquitoes in the hold, and that their sting, and the dust and heat of the hold, had a tendency to injure the wound in his head, which was not quite healed, and cause inflammation. If this was the case, there is no evidence that the captain knew it, or had the slightest intention that any such effect should be produced.

If such an effect *was* produced, and the captain afterwards discovered it, the circumstance is not important, because you have clear proof that he never ordered McGlathery into the hold again. He was not there for more than a part of a single watch, not more than two or three hours. The question, whether this work in the hold caused inflammation of the wound, is, therefore, not very material. Inflammation of it afterwards occurred. But the testimony shows that on the evening of the same day on which he was at work in the hold, a man fell back upon him, rubbing against the wound, and, in part, opening it afresh, and that until after this had occurred, there was no appearance of renewed inflammation. There is no satisfactory evidence that this accident was not the cause of the inflammation. But though it had been caused by the work in the hold, there is nothing to show

that it had been a probable result of such work, much less that such a result was intended by the captain.

On the first count you will find the defendant, Cunningham, guilty, and the defendant, Lindsay, not guilty, if you take the same view of the law and the evidence which has been taken by the Court. On the second count, you ought to find both the defendants not guilty.

The jury found a verdict accordingly, and a fine of $50 was imposed by the Court upon the defendant, Cunningham.

CIRCUIT COURT. JULY 9, 1859.

INSURANCE.

BILSON *v.* THE MANUFACTURERS INSURANCE COMPANY.

A mortgagor effects a policy of insurance against fire, which provides that the insurers' liability should cease upon an assignment of the *policy* without their consent; and that it should become void in case of the termination of the interest of the insured in the subject of the insurance. Subsequently the mortgagor makes an assignment of *all his title and interest* in the policy to the mortgagee—in *visual juxtaposition* to the policy, though without the written consent of the insurers, and a renewal is effected and premium therefor paid by the mortgagee. The mortgagor then conveys the fee to the mortgagee. *Held*,

1. That the Court properly instructed the jury that if the existence of the assignment was known to the assurers, the act of renewal included the consent required by the policy.

2. That the assignment to the mortgagee only operated as an equitable transfer of the policy, and that the approval of the assignment by the insurers did not convert his contract into a *new* one for the independent insurance of the mortgagee.

3. The transfer of the property to the mortgagee, so as to divest the mortgagor's (the plaintiff's) interest, has the same effect as if the conveyance had been made to some third person other than the mortgagee, there being, in both cases, a change of interest in the subject of the insurance. (Grosvenor *v.* The Atlantic Mut. Ins. Co., 3 Smith, 391 Pa., and the State Mut. Ins. Co. *v.* Roberts, 7 Casey, 440, Pa.—approved.)

ASSUMPSIT on Policy of Insurance.

MOTION for new trial.

The facts fully appear in the opinion of the Court, delivered by

CADWALADER, J.

The defendants insured the plaintiff in $1,500, against loss by fire, on a building in Baltimore, for one year from the 14th of March, 1856. The policy provided that the defendants' liability should cease in case of a total or partial assignment of the policy, without their consent in writing endorsed upon it; and also declared that the policy should become void in case of any transfer, or termination of the interest of the insured, (meaning interest in the building, or subject of insurance), either by sale or otherwise. It contained a provision that, the risk not being changed, the insurance might be continued for such further time as might be agreed upon; the premium for the renewal being paid, and its payment endorsed, or a receipt for it given.

The plaintiff, on the 12th of September, 1856, subscribed, on the back of the policy, an assignment of all his title and interest in it to William C. Conine. This party's interest was under a mortgage of the premises insured, executed by the plaintiff, to secure the payment of a debt greater in amount than the sum insured. This assignment was made by filling up, in a fair hand, and subscribing, a blank form, printed in large type. Conine and the plaintiff resided in Baltimore, where the defendants had a resident agent, through whom the above-mentioned insurance, and the renewal mentioned below, were effected.

On the 14th March, 1857, the defendants renewed the insurance for another year. Their agent's receipt for the premium for this renewal was endorsed upon the policy directly under the above-mentioned assignment. This assignment was in such visual juxtaposition that the agent could not have failed to see the whole of it, when he subscribed the receipt, without an extraordinary want of attention to what was before him for inspection. It was proved that Conine had paid this premium for the renewal of the insurance; and there seemed to be no reason to doubt that he was the person for whose

benefit the insurance was intended by the parties in Baltimore to continue in force.

After this renewal, the plaintiff, by a deed, of which the existence was not made known to the defendants, for a pecuniary consideration, in addition to the mortgage debt, conveyed the equity of redemption of the premises insured to the mortgagee, Conine, absolutely in fee.

After the plaintiff's interest had been thus entirely divested, the building was, before the end of the second year, consumed by fire. The loss thus incurred was of an amount greater than the sum insured.

The defendants, at the trial, objected to the plaintiff's recovery, on the ground that his assignment of the policy to Conine, having been made without the written consent required by the policy, had annulled the insurance. On this point the Court instructed the jury that the evidence would justify them in finding that the defendants' agent, when he renewed the insurance, was aware of the existence and contents of the assignment, which was then, in effect, exhibited to him; adding that, if the jury should so find, the act of renewal included, sufficiently, the consent required by the policy.

The jury found a verdict for the plaintiff. The Court is of opinion that, upon the point on which the instruction was given, the verdict was right, and that the instruction, as to this point, was not erroneous. But, the Court is also of opinion that this is not the point on which the decision of the case properly depends. The question of interest in the insurance, as distinguished from that of interest in the subject of insurance, was alone considered at the trial. The difficulty in sustaining the verdict arises from the fact that the conveyance of the equity of redemption, by the plaintiff to Conine, changed entirely the interest on the subject of insurance. As the previous mortgage debt had, in amount, exceeded the sum insured, Conine's acceptance of this conveyance might, possibly, not have modified, substantially, his interest in the insurance, as it would have been retained by him if the defendants had approved of the conveyance. But, be this as it may, the convey-

ance converted his interest in the subject of insurance, from that of a mere security for a debt, into an absolute exclusive ownership; and, at the same time, determined entirely the plaintiff's interest in the subject. Though attention may not have been particularly directed at the trial to the effect of this change of interest, the defendants, if it entirely discharged them from liability, ought not to be deprived of the benefit of it on a motion for a new trial.

Another point which has been taken, on behalf of the defendants, is that, though an action of assumpsit, at the suit of Conine, had been sustainable, upon the act of renewal, as a contract with him, the present action of assumpsit by the party originally insured, who, on the renewal, was neither the promisee nor the party to whom the loss was to be paid, cannot be sustained.

If the decision in Tillou *v.* The Kingston Mutual Insurance Company, 1 Seldon, 405, were law, there could, upon the facts of the present case, have been a recovery in an action at the suit of Conine. That case was adjudged by the Court of Appeals of New York, in 1851. Three partners, owning a mill, in which they conducted their joint business, held a policy of insurance on it against fire, which, like the policy now in question, contained a provision that it should become void if the property insured were alienated by sale or otherwise. The policy was assigned by the parties insured, with the assent of the insurers, to secure a mortgage of the mill for a debt of less amount than the sum insured. One of the partners insured, on afterwards retiring from the business, conveyed his interest in the mill to the other two owners. It was destroyed, subsequently, by fire. Two points were decided: the first, that this conveyance, by one partner to the others, had, except as to the mortgage, annulled the insurance; the second, that the mortgagee was, nevertheless, to the amount of the mortgage debt, entitled to the benefit of the insurance.

The decision of the first point, that, where partners are insured, an assignment by one of them to the others annuls the contract of insurance as between them and the insurer, has

been questioned in a subsequent extrajudicial dictum of the same Court. (3 Smith, 412.) But the decision, on this point, has been followed in a direct adjudication, by the Supreme Court of Pennsylvania, in the recent case of The Lycoming County Mutual Insurance Company *v.* Finley. In this case, the Court said, "that a sale by one partner to the other is within the prohibition, cannot be doubted. There is no exception in its favor in the instrument; and the terms used give no reason to imply any." These terms were the same as in the New York case. The partner who, without the consent of the insurer, conveys his interest in the subject of insurance to his copartners gives them, from thenceforth, an exclusive dominion and control where he had, previously, the right of participating in any control or dominion that could have been exercised. He thereby ceases to be a protector of the property insured against fire from fraud, or from any other cause for which the personal identity of a party insured can be material to an insurer. The decision on this point, therefore, appears to have been founded in sound legal reason.

On the second point, the decision was founded on the assumed reason that the approval, by the insurers, of the assignment of the policy to the mortgagee, had constituted a distinct and independent contract by them, with him, entitling him to the benefit of the insurance, in such a manner that his interest was not liable to be affected by subsequent acts or omissions of the party originally insured. On this point, the decision has been overruled by the Court of Appeals of New York in the recent cases of Grosvenor *v.* The Atlantic Mutual Insurance Company, and The Buffalo Steam Engine Works *v.* The Sun Mutual Insurance Company, 3 Smith, 391, 401, 414. As the law of New York is now settled, the assignment of a policy of insurance against fire to a mortgagee, with the assent of the insurer, merely gives to the mortgagee the right of requiring that the amount insured shall, to the extent of the mortgaged debt, be paid to him, whenever it would afterwards have been recoverable by the mortgagor if no such assignment had been made. The approval of the assignment by the insurer does

not convert his former contract of insurance into a new one for the independent insurance of the mortgagee. Unless the mortgagor could have recovered, if no assignment had been made, there can be no recovery of the insurance by, or for, the mortgagee. Therefore, a subsequent alienation of the equity of redemption by the mortgagor, made before any loss by fire without the consent or approval of the insurer, annuls the insurance as to both mortgagor and mortgagee.

The cases reported in 7 Casey, 430; 8 Cushing, 133, 136, 137, and 10 Cushing, 352, 353, show that a like doctrine on the subject prevails in Pennsylvania and in Massachusetts. In 16 Peters, 501, 502, Judge Story, in delivering the opinion of the Supreme Court, said that if "a mortgagor procures a policy on the property against fire, and he afterwards assigns the policy to the mortgagee, with the consent of the underwriters (if that is required by the contract to give it validity) as collateral security, that assignment operates solely as an equitable transfer of the policy, so as to enable the mortgagee to recover the amount due in case of loss. But it does not displace the interest of the mortgagor in the premises insured. On the contrary, the insurance is still his insurance, and on his property, and for his account. And so essential is this, that if the mortgagor should transfer the property to a third person, without the consent of the underwriters, so as to divest all his interest therein, and then a loss should occur, no recovery can be had therefor against the underwriters, because the assured has ceased to have any interest therein, and the purchaser has no right or interest in the policy."

Consequently, if in the present case the conveyance which divested the plaintiff's interest had been to another person than the mortgagee, the insurance would, from the date of such conveyance, have been, to all intents and purposes, at an end. The authorities define so clearly the rule of decision and the principle from which it is deduced, that we would not be at liberty to consider the convenience or expediency of the rule, or to inquire into probabilities of justice, or injustice, in the result of its ordinary application.

The comparative magnitudes of the mortgage debt and the sum insured cannot affect the question of the application of the rule. Nor can its application be affected by the circumstance that the person to whom the absolute conveyance in fee has been made was the same party to whom the policy had been previously assigned with the assent of the insurers. If the question depends upon the change of interest, not the insurance, but in the subject of insurance, these distinctions cannot be attended with any material difference. We have seen that the approval by the defendants of the assignment of the policy to Conine, though a recognition of him as the substitute of the plaintiff to receive the payment of a loss, had not been a dispensation with any former condition of the contract as to a change in the ownership of the subject of insurance. In two of the cases which have been cited, the transfer by a partner to his copartners of his interest in an insurance of property of their firm had introduced no new person as a party insured. The doubt in those cases did not arise from the identity of the person, but from the identity of the character of the interest which, by the transfer, had been changed, as to the remaining partners, in proportion, but not in kind, though it had been absolutely determined as to the retiring partner.

In the present case, not only was the plaintiff's interest, and with it his protective dominion and control, forever determined by the conveyance in question; but this dominion and control were irrevocably vested in Conine, by whom they could not previously have been exercised; and the character of whose interest was thus entirely changed. His personal identity as mortgagee was, therefore, so far as the reason of the rule is concerned, immaterial.

The case thus appears to be completely covered by the authorities. They show that there could not be a recovery of the insurance in an action at the suit of either Conine, or the present plaintiff. The verdict must, therefore, be set aside, and a new trial ordered.

GRIER, J.—I fully concur with my brother Cadwalader in all his views, as above expressed.

DISTRICT COURT. AUGUST 5, 1859.

CRIMINAL LAW.

THE UNITED STATES *v.* JACKSON.

Mail matter and express matter were in the same car. An intent to commit robbery in the car was proved against the prisoner, but the act was frustrated: *Held*, that the intent must be referred to both kinds of matter.

THE OFFENCE laid in the indictment was an assault on a mail agent with attempt to rob the mail.

Mr. Cassidy, for the defence.

He took the ground that if the defendant was in the car at all it was for the purpose of robbing the express, and not the United States mail, and appealed to the reason of the jury to say if this was not a more probable conclusion to arrive at than that charged in the bill of indictment. The money, a large amount of it, was there, as was shown by the witnesses for the United States, and it was much more likely that a man in the car under such circumstances had that and not the mail, a large portion of which was paper mail and worthless, as his object. He dwelt strongly on this point, and asked the jury to give it their conscientious consideration, and he doubted not that they would render a verdict of acquittal.

After a few remarks in reply by the District Attorney, Judge Cadwalader charged the jury substantially as follows:

Every attempt to commit a felony, is at the common law indictable as a misdemeanor. The act of Congress on which the present indictment is framed, in effect makes an assault upon a person having the custody of the mail, a misdemeanor, if the assault was intended as a means of enabling the assailant to rob the mail.

In this case an assault upon him without an intent to rob the mail will not sustain the prosecution. But an assault upon him with such an intent, if proved, will sustain it.

The unauthorized sqeezing of a liquid from a sponge upon the face of the person in charge of the mail, was in law an assault upon him. If you find that the assault was thus committed, the only question will be as to the intent.

Here the character of the liquid squeezed from the sponge may be considered. You probably will find from the evidence that it was chloroform, which has a soporific tendency. You may also take into consideration the evidence tending to show that the defendant had intruded himself secretly into the mail car, where his presence was unauthorized. If a person under such circumstances adopts means of this kind to render drowsy a person whose duty it is to be watchful, the inference of a guilty intent will probably appear to the jury very strong. You have also a right to take into consideration the fact that the defendant when he came into the mail car was armed with a loaded pistol.

The circumstances, taken together, tend strongly to prove that the defendant's intention was to rob. The jury will judge of their effect.

The argument on the part of the defence—that the evidence tends to show an intent to take rather the property in charge of the express agent, which was in the same car, than the contents of the mail bags—remains for consideration. If the evidence had tended to prove only one of these alternative intents, leaving it uncertain of which of them the defendant was guilty, this argument might deserve serious notice, and a careful review of the testimony might be necessary.

But, if the case presented is one in which the defendant's acts have a tendency to prove an intent to take from this car whatever was in it of greatest value that he might be able to get away with, including, as well the contents of the mail bags, as those of the express packages, then he is, in law, guilty of both intents, including that with which he is charged in this indictment. A man who thus is guilty to a greater extent than the specific charge, cannot so qualify the definition of his guilt, or apportion its probable tenden-

cies as to escape the legal consequences in a case like the present, in which the law refers the guilt to the attempt, and not to the consummation, of the purpose.

At twenty minutes past nine o'clock the jury came in with a verdict of guilty, with a recommendation to the mercy of the Court.

DISTRICT COURT. OCTOBER 21, 1859.

ADMIRALTY.

THE UNITED STATES *v.* THOMAS DODD.

Mutiny on shipboard. Act of 3d March, 1835, in relation thereto. Degree and justification of means for suppression. Effects of the abolition of flogging, and review thereof. The practice of employment of seamen on shore without inspection by master or other officer, condemned. Payment of wages in advance, condemned.

HABEAS CORPUS.

The facts were these:

THOMAS DODD and others of the crew of the ship Sir John Franklin, of Baltimore, were committed on a charge of mutiny and conspiracy to make a revolt on board of her, in a voyage from Liverpool to Philadelphia. The vessel is of the burthen of about 1,000 tons. On the 16th of July last, she sailed on this voyage, with a company of twenty-four persons, of whom twelve have been thus committed. According to the testimony before the commissioner, Dodd, on the fifth day of the voyage, called the watch on duty from their work. They went aft upon his call. The mate followed them. They asked for the captain, who, at the request of the mate, came. Through Dodd, as their spokesman, they complained of their food. The captain told them that his orders had been to provide for them well and abundantly. They then changed their ground of complaint, saying that they wanted *watch and watch.* The meaning of this phrase is, that in the daytime, as at night, none but the men of whom the watch on deck is composed shall be required to perform any duty. They said that they were a crew picked for the vessel, and that they intended to have

watch and watch. The captain said that they should not have it until he was ready to allow it to them, or words to that effect, adding that they had better go to work, and that if they did he would treat them kindly. They then refused to do duty. The watch had shortly before been changed. Dodd asked the watch that had been turned off whether they were men or mice, telling them that, if they could not get watch and watch, they ought to take it; some of them said that they *would* take it.

The captain then again ordered them to their work. They refused, some of them saying that he might put them in irons, or go back to Liverpool and put them in jail. He told them that he would do no such thing, but if they did not go to their work would blow their brains out. Some of them told him to shoot and be damned, that they did not care. He then drew a pistol and shot Dodd, who appears to have been the ring-leader, wounding him slightly, but in a part of the body where a shot might have been fatal. The captain then again ordered the men to their duty, saying that if they refused he would shoot others. They did not at once obey. One of them, named Stretch, told him to shoot again and be damned. He, however, did not fire again. They soon after submitted. All of them resumed work except the wounded man, who went to bed. He was afterwards put in irons. There was no proof of any subsequent insubordination of a serious character.

The parties committed were brought before the Court on a habeas corpus. By consent of the counsel, the case was heard upon the commissioner's report of the testimony taken before him, as above stated. The District Attorney informed the Court that the captain, against whom no charge had been made, and on whose complaint the prosecution against the crew had been instituted, was desirous that the case should be no further prosecuted. The District Attorney stated likewise that, so far as the public interest was concerned, he did not think it his duty to object to the discharge of the prisoners, if the Court, upon the case presented, would sanction the abandonment by him of the prosecution.

THE COURT having inquired what proportion of the wages

of the crew had been paid in advance, and whether the crew had been engaged by the captain or mate, or mustered or inspected by either of them before the commencement of the voyage, the captain was examined. He stated that the crew had received, each man, a month's wages in advance; that they came on board when the vessel was about leaving her moorings, and that not a man of them had been engaged, or seen, by himself or by the mate.

CADWALADER, J.

The practice of paying so large a portion of the crew's wages in advance as to give them no interest in the voyage cannot be too strongly censured. It has probably been the cause of this crew's insubordination. The policy of the maritime law is to secure to the crew their wages, on condition that the vessel survives the voyage, and that they perform their duty. Their lien for wages, under these conditions, is peculiarly favored and effectually secured. But the wages are lost if the vessel is lost, and are forfeited if their duty as navigators is violated. An advance of a reasonable proportion of their wages does not altogether frustrate this policy. But it is altogether frustrated by the practice of paying to them in advance an amount of money so great that, if the voyage proves to be a short one, they remain in debt to the vessel, which they usually leave immediately on her arrival in port. Formerly the fear of a forfeiture of wages was an effectual preventive, or check, of insubordination of a mutinous tendency. But this aid in maintaining the necessary discipline on board is lost under this injudicious practise. In the present case, the men who had already received a month's wages had no objection to the vessel, when five days out, putting back to her port of departure. They appear to have thought that the captain would have been compelled to choose between this alternative and compliance with the terms which they strove to dictate.

Another bad practice is that of confiding the selection of the crew of a vessel entirely to an agent on shore, without even an inspection of them by her captain or other officer. This prac-

tice is opposed to essential interests of navigation, and, therefore, cannot be excused by its alleged prevalence on both sides of the Atlantic. A vessel without a competent crew is, in law, unseaworthy. Her principal navigator is responsible to God and man for inattention to their selection. The cargoes of merchant vessels trading between this country and certain ports of Europe are now seldom taken in, or unladen, by their crews. This business is often performed advantageously by stevedores and other landsmen. The consequence has been that crews for voyages in this trade are now usually shipped just as the vessels are leaving port; and at the end of their outward voyages are discharged, other crews being shipped for the return voyages. The employment of trustworthy shipping agents may, therefore, be convenient and unobjectionable. But the selection of the crew cannot be trusted so exclusively to such middlemen as to dispense with attention by the principal navigator of a vessel to the question of their competency. This view of the subject is, I believe, already in part understood in some of our ports, where the men are no longer shipped without being seen or conversed with. It will soon, from necessity, be understood everywhere. The point is now of greater importance than formerly, when the persons who did not ship as boys or apprentices were usually men who had been trained as navigators. In this respect the system has, of late years, been greatly changed. Apprenticeships from our ports are now almost unknown. The numerous cases of daily occurrence in which dangers or difficulties at sea are encountered from the incompetency or insubordination of the crews of merchant vessels teach an appalling lesson of the necessity of increased caution in their selection or approval.

As the crews in this trade are very seldom shipped for the round voyage, they are frequently composed of men of different nations, whose laws differ as to the discipline on board of their vessels. The difficulty of maintaining a uniform system of discipline on board is often, therefore, very great. The United States, for example, have, of late, prohibited flogging as a punishment. This was, I think, a wise act of legislation. I know

that many merchants and navigators of great experience entertain a different opinion. Some of them rest their objection to this change of the law upon the reason that other nations continue to permit flogging, and that English and other mariners accustomed to see the discipline of a ship enforced by this punishment become insubordinate in vessels in which it cannot be inflicted.

According to this mode of reasoning, no improvement in the system of maritime discipline could ever be effected without a simultaneous occurrence in the legislation of all civilized governments. This concurrence cannot be expected. In matters which concern all mankind alike, legislative improvements are often thus begun by a single nation. They afterwards extend themselves gradually, as experience tests their usefulness and practicability. In the meantime, incidental difficulties may occur. They almost always arise, in a greater or less degree, from innovations, even from the wisest. When such difficulties occur, they must be encountered and overcome. The abolition of this degrading punishment, when it was prohibited in our vessels by the act of 1850, was a necessary improvement in the law of navigation.

It only restored a rule of the former maritime code of Europe. Until a period long after the mariner's compass was, to some extent, in use, those who followed the business of navigation were not a class of citizens as distinct from landsmen as they afterwards became. Winter voyages, which had been prohibited by the Greeks and Romans, were likewise, until after this period, prohibited by the laws of the most commercial states of Europe. (See Pard. Col. Mar. VI 655, Tit. "Hivernage," and II, 148, 149.) For several months of the year they were, therefore, on shore. During the first of the year navigators were seldom for long periods out of sight of land. Their most important commercial enterprises were trading voyages, from port to port, along the coasts, or to the European islands. Moreover, no merchant vessel was at any time exempt from liability to be called into the service of her nation, for purposes of state or of war.

When thus called into the public service, which very often occurred, the crews of each vessel in a fleet, in some countries, elected their own captain, subject to the approval of the government, the commander only of the fleet being directly appointed by the state. When engaged in private commercial navigation, the rule and the practice was, that the captain, on all important questions, whether to set sail, to make a port, or lighten the vessel in a storm, etc., should consult the ship's company. In those days the strictest discipline was enforced. Punishments of a serious kind were inflicted, sometimes on arrival in port, sometimes on board of the vessel. A mariner might in some cases be put to death. In others he was liable to the loss of his hand. Every mutinous tendency might be promptly repressed. Obedience to orders was enforced by the severest penalties. The mariner was expressly required to submit even to a blow struck by the master; but if the blow was repeated, he might, in self-defence, resist the master. (Ib. I, 332, 378; II, 146.)

Thus, where punishment much more severe might be imposed, flogging was deemed unlawful. But afterwards, when distant voyages of long duration became usual, with no interval of rest in the winter season, mariners were almost exiled from association with landsmen. Maritime laws could no longer be made upon land, but were adopted necessarily from usages of the sea. These usages were, in some respects, brutalized among the semi-piratical navigators from Spain, Portugal, and England, afterwards engaged in voyages of discovery and of colonization, or in the trade with new settlements in remote regions. In the meantime, the navies of the state and the merchant marine had been separated, except when the navigators of merchant vessels were employed as privateers, in a system of warfare which had no tendency to improve bad habits acquired in time of peace. During some of these periods, the practice of imposing flogging as a punishment, in men-of-war and in merchant vessels, in time of peace and of war, became prevalent. Because of this prevalence, its lawfulness was recognized.

Before the independence of the United States, our trade had been with England alone. The lawfulness of this mode of punishment in English vessels had been unquestionable. It therefore became lawful in vessels of the United States, and continued to be lawful until the Act of 1850. Before that act the experience gained in whaling voyages and in some other kinds of navigation, in which the crew participated in the profits, had shown that the former degradation of the service of a mariner was not always essential to subordination. A necessary measure for the removal of this degradation has been the prohibition of flogging. As an experiment it cannot, as I have intimated, be fairly tried without some incidental difficulties. These difficulties, when encountered, must, as I have said, be overcome.

It would often be unjust to ignore their existence. It cannot be disregarded in a case like the present, when the crew, taken in at an English port, were not unlikely to become insubordinate in a vessel in which flogging was known by them to be prohibited. This was an additional reason for the captain to have made himself acquainted with the character of the crew before they were shipped. But it might, after they were shipped, have a tendency to excuse, and, in some cases justify, the use of a pistol in order to quell an intended revolt.

The captain of this vessel, in an inquiry like the present, is not to be made responsible for his conformity to injudicious practices which prevail to such an extent that he, alone and without support, could not, in a foreign country, have assumed the part of a reformer. He probably could not have obtained a crew without making such an advance, as the captains of other merchant vessels had paid without objection on the part of their owners, or of insurers. He probably could not have dispensed with the employment of a shipping agent. The intervention of such an agent did not excuse the omission to see and converse with the men before they signed the articles. But as the occurrence in question did not happen until they had been five days on board, the circumstance is less material than if the difficulty had occurred immediately on leaving port.

The embarrassment of this case arises from the circumstance that a pistol was fired, and that the shot took effect in such a manner that the captain cannot be justified unless he would have been excusable if it had resulted in the death of the man who was wounded. It is true that no prosecution against the captain has been instituted, and that his conduct, under the circumstances, may have been justifiable, from the necessity of suppressing an incipient mutiny. But the difficulty consists in determining whether a case of such insubordination as would, on this ground, excuse him of firing the shot, is not of too serious a character to be disposed of until it shall have been passed upon by a jury.

The act of Congress of 3d March, 1835, as it has been judicially interpreted, extends the definition of a revolt or mutiny at sea, so that it includes cases to which the previous legal definition of the offence did not apply. Under this act, every combination to resist the free and lawful exercise of the commander's authority in indictable. The distinction between mere insubordination requiring punishment in order to maintain the discipline of a vessel, and an offence of such a character as requires or excuses the use of a deadly weapon, in order to secure the safety of a vessel, is one which cannot always be readily drawn. In a case of the latter character, there would be no security to navigation if we were to draw nice distinctions as to the course to be pursued by a captain. The rule of his conduct is that which a sound and well-regulated discretion may suggest. His own judgment, if discreetly exercised, is thus, within certain limits, the only rule.

The use of a pistol must, however, always render the case one for very serious consideration. If the insubordination had been that of a single seaman, or if a small number only of the crew, the use of a pistol could not have been justified under circumstances like those of the present case. The case presented, however, is not that of a single offender, but that of a combination, in which a sufficient number of the men were associated to render their immediate subjection to discipline essential to the security of the vessel. If this be the true view

of the case, a great part of its difficulty is removed. It may then be considered with a sole reference to the conduct of the men, independently of any ulterior question as to that of the captain.

Under the act of 1835, cases may be indictable in which the District Attorney may, with great propriety, forbear to prosecute parties who, in other modes, have already been punished sufficiently. Thus, where wages have been forfeited, or where damages have been awarded on the civil side of the court, there would sometimes, in cases where the guilt has not been aggravated, be more cruelty than justice in pressing a prosecution. In this case, while he does not abandon absolutely the prosecution, his official opinion that it should not be further pressed is very distinctly intimated.

If the defendants could have a speedy trial, I should think the case one which, unless absolutely abandoned by the District Attorney, on his official responsibility, should be passed upon by a jury. But the parties charged have already been imprisoned for more than a month. The jury for the present term had been discharged before the arrival of the vessel at this port. Upon an application of the counsel of the prisoners, or of the United States, the Court would have ordered a special venire, so that a trial might have been had before this time. But no such application was made, and no blame can be imputed for having awaited the ordinary course of judicial business.

In the meantime, the original counsel of the defendants has died. At present, no arrangement could be made for their trial before the latter part of next month. As the parties and witnesses are all engaged in the business of navigation, this additional delay until the approach of the winter season might result in excessive hardship. Therefore, as a speedy trial cannot be had, I will not, after the statements which have been made by the District Attorney, detain the parties longer in custody. But I have not without great hesitation arrived at this conclusion. Let an order be made for their discharge.

DISTRICT COURT. DECEMBER 3, 1859.

REVENUE.

THE UNITED STATES *v.* CIGARS. MAYOZ AND OTHERS, CLAIMANTS.

THE SAME *v.* LINENS. ROBINSON, CLAIMANT.

1. Upon information filed against goods alleged to be forfeited under the Revenue Collection Act of 1799, and its Supplements, the goods pass out of the hands of the collector who seizes them into the hands of the marshal, whose custody is thenceforth that of the court.

2. No penal increase of duties can afterwards be exacted by the collector from a claimant of the goods, though such a penalty might lawfully have been imposed before the goods were seized as forfeited.

3. If such a penal increase has been received by the collector before the seizure, the goods, though they would otherwise have been liable to forfeiture, are exempt from such liability.

4. His exaction of such an increase after information filed, though an illegal act on his part, does not affect the prosecution against the goods.

5. Under proceedings upon a petition of the claimant for the delivery to him of the goods on his giving a bond, with surety, for their appraised value, he is to pay no greater amount of duties than would have been demandable of him if the fairness of the importation had not been impeached.

6. If the goods are afterwards condemned he loses the amount of the regular duties thus assessed, as well as the value of the goods forfeited.

7. The bond, in such a case, is a substitute for the proceeds of the goods which, if it had not been given, would have been sold by the marshal.

8. It must, therefore, be given for the market value of the goods at the place of seizure, without any deduction for the regular amount of duties which are thus payable at all events.

9. If under such a proceeding, the collector and naval officer should refuse to give a receipt, conformably to the act of 1799, for the regular amount of duties, and require the payment of a penal excess, the court will order the delivery of the goods to the claimant upon the execution of the bond, and payment of the proper amount of duties.

10. Where payment of such an excess had been exacted unlawfully by the refusal of such a receipt, and had been made under protest, the goods having been afterwards condemned, and the amount of the bond paid into court, the excess was, by the court's order, repaid to the claimant out of the fund in court.

11. A case in which such a payment has been thus made after information filed, and in the course of a proceeding under the direction and control of the court, is not within the statutes and rules of decision applicable to other cases of duties paid under protest.

Information for revenue.

Petition by claimants praying that the cigars might be appraised and delivered to them upon their executing a bond with surety for the amount of the appraisement.

A question arose whether the amount of the duties upon the cigars was to be deducted by the appraisers from the market value and the difference to be returned as their valuation, or their appraisement at the market value was to be returned without any such deduction.

CADWALADER, J.

The 89th Section of the Revenue Collection Act of 1799 provides that when vessels or goods have been seized and prosecuted as forfeited, the court may, upon the prayer of a claimant that they be delivered to him, appoint three sworn appraisers, on the return of whose valuation, if the claimant shall, with one or more approved sureties, execute a bond for the amount of the appraisement, and produce a certificate of the collector and naval officer that the duties have been paid or secured in like manner as if the vessel or goods "had been *legally* entered" the Court shall order the same to be delivered to such claimant. The section provides that the bond shall remain in court, and, upon judgment in favor of the claimant, shall be cancelled, but that if the judgment shall be in whole, or in part, against him, and he shall not, within twenty days thereafter, pay into court the amount of the appraised value of the vessel or goods condemned, with costs, judgment upon the bond may, forthwith, be entered upon motion in court. The 90th and 91st Sections enact that vessels and goods condemned for which bond shall not have been given as above shall be sold, under the court's order, by the marshal, and the proceeds, after deducting all proper costs and charges, paid, one moiety to the United States and the other moiety to designated officers of the Revenue Collection Service, with distinct provisions for cases in which there is an informer.

The 36th Section of this act required the production to the

collector and naval officer of the original invoices of the goods imported. The 66th Section enacted that if any such goods should be falsely invoiced as to their cost, with design to evade the duties, or any part thereof, the goods, or their value to be recovered of the person making entry, should be forfeited, and that where the collector should suspect the goods to be invoiced below their market value at the place of exportation, he should take possession of them and retain them until their value should be ascertained by appraisement in a prescribed mode, and the duties, according to such valuation, paid, or secured in the manner therein required. The latter provision of the 66th Section explains the clause in the 89th Section which provides that in a case like the present the amount of duties to be paid by the claimant is the sum that would have been payable if the property seized had been *legally* entered. These, which may be called *regular duties*, are, in the case of goods alleged to be falsely invoiced, the duties which would have been assessed if the fairness of the invoice had not been impeached. Had the 89th Section contained no such definition of their amount for a case like the present, the collector and naval officer, instead of assessing, in such a case, the amount of duties that would have been payable according to the invoice, might, as in the case of a suspected invoice, have exacted from the party giving bond the payment of the duty assessed upon a higher valuation. This the 89th Section prevents. The present question, however, concerns the *regular* duties only. The question is whether the amount of these duties, which is to be paid by the claimant at all events, is to be deducted by the appraisers in their ascertainment of the value for which he is to give the bond. The question, in other words, is, whether, if judgment of condemnation be rendered, he is to *lose the amount of these duties as well as the value of the property forfeited.*

A series of subsequent laws has established a system of appraisement under which all subjects of ad valorem duty are valued by sworn public officers. These laws have imposed, in certain cases, a penal increase of the duties upon

imported merchandise invoiced at a designated rate below the proper valuation. It is also indictable as a misdemeanor to make out, or pass, or attempt to pass, any false, forged or *fraudulent* invoice through the custom house. In the cases reported in 16 Peters, 342; 3 Howard, 197; and 17 Howard, 86, the Supreme Court has decided that these enactments have not impliedly repealed the provision in the 66th Section of the act of 1799, that where imported goods are falsely invoiced with a design to evade the payment of any part of the duties, the goods or their value are liable to forfeiture. In the last of these cases the court say that if the *additional* duty of twenty per cent. imposed when the appraised value exceeds the invoice price by ten per cent. has been levied upon the goods by the government, it cannot forfeit them under the 66th Section of the act of 1799, but if the collector is satisfied that such an undervaluation in the invoice has been made with intent to evade the duties, then, instead of levying the *additional* duty, a forfeiture may be declared. The Court added that a forfeiture may be declared in cases of undervaluation of less than ten per cent. of the invoice price where the fraudulent design exists. (17 How. 93, 94.) If the Court had been of opinion that *no duties whatever* could be levied upon *forfeited* goods, they would not have made this remark distinctively as to the *additional* duty alone. The distinction between the additional and the *regular* duty was recognized conversely in Stairs *v.* Peaslee (18 Howard, 529), in certain remarks of the Court upon the case of Bartlett *v.* Kane (16 How. 263). In this case goods entered at the invoice price had been found by the appraisers to be invoiced ten per cent. below the dutiable value. The penal duty of twenty per cent. had therefore been exacted. A portion of the goods were warehoused, and afterwards entered for exportation. On these goods the *regular* duty was returnable to the importer. But the Court was of opinion that the collector could retain the *penal* duty upon them, which had been levied. The reason of the distinction had been partially indicated in the previous case of McLane *v.* The

United States. (6 Peters, 404, 427.) There *prohibited* goods, which could not regularly have become dutiable, were the subject of consideration. The Supreme Court said that "no duties, *as such*, can legally accrue upon the importation of *prohibited* goods," assigning as the reason that "they are not entitled to entry at the custom house." This language implies that the contrary should be the rule as to such *forfeited* goods as have been or ought to have been entered at the custom house. The liability of the importer for the duties upon goods of the latter class depends upon a personal contract implied in his act of importation. But the implication of such a contract cannot be extended to a *penal* addition to the duty. It may, for some purposes, be extended so as to include such a simple addition to the invoiced value as the appraisers may make without a *penal* increase of its amount. But this is not the rule for the purposes of the 89th Section of the act of 1799, under which the proper assessment of the duties is upon the invoice as if it were fair and unimpeached. This rule could not here be departed from without prejudging, more or less, the question for ultimate adjudication. A case in which a forfeiture is insisted upon should not be thus prejudged in any degree in a preliminary stage of the proceedings.

The existence and character of the distinction between the additional and the regular duty having been thus ascertained, we may now consider some authorities which bear less indirectly upon the question whether an importer of dutiable goods is liable, personally, for the duties upon them when they are forfeited. Hereafter the word *duties* will be understood as designating what have hitherto been called *regular* duties.

Salter *v.* Malapert, 1 Roll. Rep. 383, was an action of debt for the recovery by farmers of the customs of a statutory duty of twelve pence in the pound for goods imported by foreign merchants and unladen without payment of the duty. The farmers had received the grant of the customs, but not of the forfeitures. These the king had reserved.

The importers had compounded for the forfeiture with the king, and pleaded this in bar of a suit against them by the farmers for the duty. The plaintiffs demurred to the plea. Judgment was given for the plaintiffs. The reason of the judgment, as delivered by Chief Baron Tanfield, was that the duty of a shilling in the pound became a debt upon the bringing of the goods into port, when the plaintiffs acquired a vested right of action. Upon the authority of this decision Chief Baron Comyns (Dig. Debt, A. 9), under the head of *debt upon contract implied* states the law to be that debt lies for *customs due for merchandise,* though the goods are *forfeited for non-payment.*

In Swinerton *v.* Wolstonholme, reported by Sir M. Hale in his Treatise on Customs (Harg. L. T. 214), the reason upon which the above decision is founded was reconsidered. A majority of the Barons of the Exchequer were of opinion that the "duties grow due by the unlading." The opinion afterwards entertained in England by the Crown lawyers appears to have been that the voluntary bringing of goods within the limits of a port of entry with intent that they shall be unladen renders them liable to duty. (Reevès on Shipping, 260, 261.) In Meredith *v.* The United States (13 Peters, 493 to 496) this rule was recognized as having been established in 5 Cranch, 368, and 9 Cranch, 104. The court said that, in a fiscal sense, the right of the government to duties upon goods accrues on their arrival at a port of entry, that, under the credit system then in force, the duty was not extinguished by taking a bond which either did not cover the whole sum due, or was not executed by all the parties liable, and that the amount justly due might be recovered in an action of debt, although no such bond as was then required by law had been given, and might be thus recovered independently of any official or other assessment of the duties. The court said "an action of debt lies against the importer for the duties whenever by accident, mistake or fraud no duties or short duties have been paid." (See also United States *v.* Lyman, 1 Mason, 481.)

In Wood *v.* The United States (16 Peters, 362), and Taylor *v.* The United States (3 Howard, 197), goods imported at New York, after having been passed, in regular form, through the custom house there, had been seized in the one case at Philadelphia, in the other case at Baltimore, in the hands of agents of the respective importers. The goods, in each case, were condemned as forfeited for fraudulent undervaluation in the invoices upon which they had been entered. These cases decide that the payment by the importer to the United States of the full amount of duties assessed by the collector and naval officer upon goods passed by the appraisers of the customs at the invoiced value; and delivered under a formal permit, is no bar to such a subsequent proceeding to forfeit the goods. The success of the fraud by which the officers of the customs had been deceived, was, of course, no justification. The importers, in these cases, lost the goods as well as the amount of the duties which had previously been paid. The 66th Section of the act of 1799, under which the goods were condemned, imposes, in the alternative, as we have seen, a forfeiture, either of the goods, or of their *value* to be recovered of the importer. If those goods, instead of being still in the hands of the importers, or of their own agents, had been previously sold in the market, the pecuniary *value* could, therefore, have been recovered from the respective importers in actions of debt at the suit of The United States (see Caldwell *v.* The United States, 8 Howard, 366). The amount of the duties previously paid could not then have been set off as a deduction from the full value which would have been recoverable.

The circumstance that the duties have not been paid when the proceeding to forfeit the goods is instituted is, in reason, attended with no difference in favor of the importer. If the proceeding is groundless, the goods are to be restored to him, but the regular duties are to be paid. If the goods are condemned, he loses them, but this does not exempt him from liability for the duties. In 13 Peters, 493, the Supreme

Court cited with approbation, a decision of the English Court of Exchequer (Anstr. 558), that where a dutiable article was lost or destroyed by a casualty before it became available to the party personally liable for the duty, his liability nevertheless continued. If the loss of the property by misfortune does not exempt him, his loss of it from his own fraud should not cause an exemption. In the present case, if the goods are not bonded, a personal action for the duties will be maintainable against the importer. He could not plead in bar of it that the goods are the subject of a pending prosecution for an alleged forfeiture. He could not have avoided this liability by omitting to claim the goods. He cannot escape from it by withdrawing his claim, or by confessing the forfeiture of the goods, or otherwise abandoning them to the United States. The liability for the duties as a debt may thus be enforced as well before as after their condemnation.

If the goods are to be delivered to him upon substituting the proposed bond for them, it should be a substitute for their full value, not for the value less the amount of the duties which are, at all events, to be paid. The bond stands in the place of the property which, in case of condemnation, would, if no bond had been given, have been sold by the marshal. Under such a sale by the marshal, the whole proceeds must be paid into the court, if any question as to their distribution is to be determined. It may be said that as there was a lien for the duties, they must, if not previously paid, be discharged out of the proceeds when they are thus paid into court. It is true that such a lien exists, and that it may, in case of the importer's insolvency, be the only available security to the United States for the duties. But the existence of such an additional security for them cannot alter the rule of law that the importer of goods which are forfeited or forfeitable is personally liable for the duties.

In Hoyt *v.* The United States (10 Howard, 137), goods had under a petition like the present been appraised, and a bond given for the appraised value. They were afterwards

condemned whereupon the amount of the bond was paid into court. The collector, naval officer and surveyor were entitled to, and received, one-half of this amount, and the United States the other moiety. The collector, suggesting on behalf of himself and his brother officers, that the amount of the duties on the goods had been deducted from the valuation before the return of the appraisement, and that the sum paid into court was therefore less by that amount than the full value of the forfeited goods, insisted that the duties were a part of the forfeiture, and that their amount should be divided by the United States with the officers. In support of the position thus assumed, it was contended that *no duties are demandable upon forfeited goods.* The opinion of the court contains an abstract of the relevant provisions of the 89th, 90th, and 91st Sections of the act of 1799. The decision was, that when the claimant elects, under their provisions, to give a bond and pay the duties, with a view to the delivery of the vessel or goods to him, "the duties thus paid constitute no part of the proceeds of the goods forfeited." The Court in arriving at this conclusion, remarked incidentally that if the vessel or goods are condemned, the claimant "*loses as well the duties paid or secured, as the property seized and condemned.*" This would not be the case if the amount of duties had been deducted by the appraisers from their valuation, before its return to the Court. The case might have been adjudged without a decision of this question. But the simplest mode of adjudication was to decide the question; and this mode was adopted. The question, therefore, cannot be considered as an open one.

Consequently these goods are to be appraised at their market value here, from which there should be no deduction before the return of the appraisement. If the authorities had not furnished a reason and rule of interpretation of the 89th Section of the act of 1799, which seems to be decisive of the question, the words of the section could scarcely have been strained so as to warrant any deduction whatever by the appraisers, from the market value.

UNITED STATES *v.* LINENS.

The goods in this case had been delivered to the claimant on his execution of a bond with surety, approved conformably to the provisions of the 89th Section of the act of 1799. Judgment of condemnation having been afterwards rendered, the amount of the bond was paid into court. A commissioner was appointed to distribute the fund thus in court. The commissioner's report showed that in the course of the proceedings for the delivery of the goods to the claimant, the penal duty of twenty per cent. had been exacted from him by the collector, in addition to the regular duties. The claimant paid the amount of the penal duties, protesting against its exaction, and, before the commissioner, claimed its return to him out of the money in court. The commissioner reported that it should be returned accordingly. The United States excepted to the report.

Van Dyke, District Attorney, in support of the exception. *Loughead* for the claimant.

CADWALADER, J.

The subject of this exception has been, in part, considered in the opinion of the Court delivered to-day in the case of the United States *v.* Cigars, Mayoz, claimant. According to the opinion of the Supreme Court expressed in 17 Howard, 93, 94, the exaction of the penal duty, after the prosecution to forfeit the goods had been instituted was illegal. It has been said, however, that, in the present case, the appraisers, before the return of their valuation, deducted from it the amount of the regular duty, and that, consequently, the whole amount, which, if the exception should be sustained, will be received by the United States, will not exceed the sum rightly receivable. The question whether the amount of the regular duties was, in fact, thus deducted by the appraisers from the valuation, cannot be judicially investigated. According to the decision in 10 Howard, 137, the

Court must assume that the goods were properly appraised at their market value.

The case is, therefore, simply that of an exaction, by the collector, of an excess above the amount of duties properly receivable. The District Attorney objects to the reimbursement of this excess out of the fund in court. He contends that it is only recoverable in an action against the collector, and insists that the present demand of this claimant against the United States should, no more than any distinct independent demand of the same party, be deducted from the fund in court.

In his argument, the difference between the exaction of such a payment by the collector, before information filed at the suit of the United States, and its exaction afterwards, has been overlooked. When the information is filed the goods are taken out of the hands of the collector, and pass into those of the marshal, whose custody from thenceforth is that of the Court. (13 Peters, 279.) In the present case, if payment of the penal duty had been exacted before information filed, the goods, according to the above cited opinion in 17 Howard, would have been exempted from liability to forfeiture. They have nevertheless been condemned as forfeited. The collector's act after the information filed, could not affect the result of the prosecution. The present is a converse question. The claimant became entitled to a delivery of the goods to him upon payment of the duties assessed, as if they had been legally entered. When the collector exacted the payment of a greater amount, the proceeding was under the direction and control of the Court. The claimant was entitled to the Court's protection against the demand of the excess. Its payment was, however, exacted, the collector and naval officer having refused to give a receipt for the duties until it was paid. Such an exaction, after information filed, should be redressed on a principle similar to that which would apply if the exaction had been made by the marshal or other officer of the Court. The excess which passed into the hands of the collector has been

accounted for by him to the United States, who now demand, in effect, the double forfeiture of this penal amount. The act of the Court would therefore sanction a wrong, if the commissioner's report should not be confirmed. The wrong would result from a proceeding which has been, or ought to have been, from its commencement, under the direction and control of the Court. This cannot be permitted. The case is not within the statutes and rules of decision applicable to ordinary cases of duties paid under protest. The commissioner's report is consequently confirmed.

DISTRICT COURT. APRIL 7, 1860.

ADMIRALTY.

RUTTER, NEWHALL & CO. *v.* THE BARQUE FERRIS AND CARGO.

SALVAGE—DERELICT VESSEL AND CARGO.

1. A judicial sale of a vessel is never a fair test of her value.
2. Where she can be restored to a navigable condition, and enabled to resume her voyage with her cargo on board, the award of a fixed sum to the salvors is always preferable to the award of a proportion of the proceeds of a future judicial sale; and the amount of the award should be estimated with a view to the probability of its being raised without an admiralty sale, and, in some cases, with regard to the probability of its being raised by way of bottomry or hypothecation. In cases of salvage prompt redemption of the property is encouraged, both in the earlier and ulterior stages of them, in the practice of permitting pecuniary deposits to secure the salvage money.

LIBEL for salvage.

STATEMENT OF THE CASE.

The barque Ferris, a British vessel, left New York with a cargo of naval stores, rosin, tar, etc., on board, upon the 14th February, 1860, bound for the port of Liverpool. After proceeding about two days upon her voyage, the vessel began to

labor heavily, shipping large seas on deck, when the pumps were sounded, and five feet of water found in the hold. The efforts made to free her from the water being ineffectual, she made a signal of distress, and her captain and crew were taken on board by the ship The Forest City, which carried them to New York. On the 17th February she was found by the vessel of the libellants, the barque Charlotte E. Tay, thus abandoned at sea and derelict. The crew of the Charlotte E. Tay consisted of six men, besides the captain, two officers, the steward, and a cabin boy. The first officer and two of the crew of the Tay were placed on board the Ferris, with orders to bring her, if possible, to the port of Philadelphia. For three days, the weather, continuing tempestuous and the sea running high, they labored to keep her afloat; when, on the 20th February, the wind changing, they made the Delaware breakwater and took four pilots on board, who brought her to this port, which she reached on Thursday, February 23, 1860.

The libel averred, and it was not denied in the answer, that had it not been for the assistance thus rendered to her the barque Ferris and her cargo would have been lost; and prayed a decree of such sum of money or proportion of the value of the barque and her cargo to the libellants, as compensation for their salvage services, as should be meet and reasonable.

Kane and *Wharton,* for libellants.
Riche, G. W. Biddle, Waln, and *Cramond,* for respondents.

CADWALADER, J.

In this case the services were highly meritorious. The property, which has been wholly saved, would probably have been wholly lost if it had not been rendered. Whether, indeed, any particular merit is attributable to the navigator of the Tay is, perhaps, doubtful. But whatever may detract from the value of the services rendered by the vessel increases the merit of her crew who boarded the derelict vessel, and brought her into port. This may, therefore, affect the distribution of the salvage to be decreed, but should not, in the meantime, operate in

reduction of its entire amount. If a proportion of the net proceeds of a future judicial sale should be decreed as the compensation for the salvage service, I think that, with a due regard to the policy of encouraging the enterprise and perseverance of nautical salvors, the proportion ought to be one-half. But I do not think this the proper mode of determining the amount. A judicial sale is never a legal test of value. Where it has occurred in consequence of the default of a party who should have protected the property against it, he is liable for the difference between the actual proceeds and the fair market value. This has been adjudged in the Circuit Court for this district, sitting in equity. A judicial sale under proceedings in admiralty is peculiarly the reverse of a fair test of value; it is more frequently the means of producing inordinate sacrifice. The subject of sale is often at a place not its proper market. In order to avoid the charges of custody and other accumulating costs, the sale is often ordered before absent parties interested can be represented. In other cases, in consequence of the delay which occurs, the property frequently undergoes deterioration, while these charges and costs accumulate. Afterwards, when the dregs of litigation are sold, they are often sadly sacrificed according even to their deteriorated value. This vessel and her cargo together, according to the market rate of commercial sales and purchases, are now valued at between $18,000 and $19,000. Experience of admiralty sales in all parts of the world attests the probability that the net future avails of a sale of this property by the marshal might not exceed the half of that amount. That the present case would probably constitute an exception from the general truth of the remark is not safely to be conjectured. But if it were an ascertained exception, the general remark as to the ordinary effect of awarding one-half of the net proceeds would not be less applicable.

When a vessel can be restored to a navigable condition, and enabled to resume her voyage with her cargo, the award of a fixed sum is always preferable to that of a proportion. The value of the property saved is, of course, always to be regarded

in fixing the sum. The preliminary appraisement may be regarded as determining the approximate value according to the price of a sale made without undue sacrifice. The proportion of this appraised value decreed in the form of a fixed sum should not be the same as the proportion of proceeds of a future judicial sale. The amount should be estimated with a view to the probability of its being paid without any such sale; and, in some cases, with a view of a probability of its being raised by way of bottomry, or simple hypothecation. An examination of the cases of salvage awarded in fixed sums for boarding and bringing in derelict vessels will show, I think, that the proportions of such sums to the respective amounts of the preliminary appraisements has usually been less than one-half of the proportions awarded as payable out of proceeds of judicial sales. This difference in proportion has not always been attended with any reduction of the amounts received by the salvors.

In administering maritime law under this head, the prompt redemption of the property saved from judicial custody is encouraged in the practice of permitting pecuniary deposits to secure the salvage. This is usually done in the earliest stage of a salvage cause. In the case of a vessel or other property not at the port of its ownership, an extended application of the principle in ulterior stages of the cause may sometimes promote the interests of commercial navigation. This remark applies particularly when, as in the present case, the vessel and cargo are of distant foreign ownership. Merchants and capitalists at or near the port of refuge ought always to be encouraged and facilitated in advancing to her masters and owners funds to pay salvage and enable her to resume her voyage, instead of abiding the doom of an admiralty sale. Justice must, at the same time, be done to the salvors. But they are usually nautical persons, to whom promptness of settlements is often quite as important as the amount receivable. Public policy, rather than their own merit, often determines the amount of their compensation. It ordinarily exceeds greatly the mere value of service rendered. Public policy has likewise other

objects, and among them that of encouraging offers to rescue the property from litigation.

In a foreign port, by which I mean any other than a vessel's home port, when a sum of money not inadequate as a compensation to salvors is promptly offered, at an early hearing of a salvage cause, and the master or agent of the owner cannot obtain an advance of a greater sum in order to get the vessel afloat and enable her to resume her voyage, the policy which would induce a Court of Admiralty to adhere very closely to any slightly different rate or amount that might otherwise have been decreed would be narrow and illiberal. The rejection of such an offer might occur when a larger amount could not be raised. The result might then be a disastrous judicial sale. The party making such an offer becomes, in certain cases, as it were, a second salvor. The rate of salvage compensation is always, if not arbitrary, more or less uncertain. If the particular circumstances of a case, nicely scanned, would, in the absence of such an offer, have induced a judge to decree a somewhat larger amount, he might little promote the interests of navigation by rigidly refusing to liberate the property saved on payment of the sum offered.

In the present case, if no such offer had been made, I would probably have decreed the payment of $4,500, with the expenses, which are said to amount to about $850, and costs to the libellants.

By consent, this cause was heard summarily soon after its commencement. The agent of the foreign owners—the master of the vessel assenting—without any knowledge of my views as to the amount, offered at the hearing to pay in cash, at once, $5,000, to obtain the liberation of the property saved, without making any further payment in reimbursement of expenses incurred by the salvors, or for costs. This offer was promptly made, in the earliest stage of litigation in which parties in the situation of those making it could, through the depositions, have been properly apprized of the particular merits of the controversy.

The difference between this offer and the decree which I

might otherwise have made is too small to be acted upon. Perhaps the decree for $4,500 and expenses and costs of suit, if made, would be acquiesced in, and the amount at once paid. But I will not speculate upon such a contingency. By so doing in this or in other cases, I might frustrate the purpose in view. A small addition might, for example, prevent a loan on bottomry from being effected.

Acting upon the general principle above defined, I prefer decreeing that, upon the payment of $5,000 to the salvors without costs, the vessel and her cargo be liberated. This will leave $4,000, more or less, to the salvors. The amount is much more than an ample compensation for the service performed, and includes, I think, a sufficient addition to fulfill the purpose of public policy. To nautical salvors in general, a decree for such an amount, with immediate payment, would be preferable to a decree of one-half of the net proceeds of the property after a protracted litigation. There is no certainty that the amount might not even exceed one-half of the net ultimate available proceeds.

Decree for $5,000, without costs.

AN APPEAL to the Circuit Court having been taken, so much of the decree as related to costs was reversed, and an order made in favor of the libellants for full legal costs.

DISTRICT COURT. APRIL 28, 1860.

ADMIRALTY.

THE CANAL BOAT HEHN *v.* THE STEAMER ANTHRACITE.

Where the remote cause of collision between two vessels was an improvident deviation from the track by one of them, the vessel so deviating is alone liable for the injury which may result, even if, in the confusion produced by the deviation, error be committed by the other vessel and it participates in the immediate cause of injury.

This was a cause of collision.

CADWALADER, J.

The libel is at the suit of the owner of the canal boat Hehn, and her cargo, to recover the loss by a collision which caused her to sink in the river Delaware nearly opposite to Willow street in the City of Philadelphia on 8th October, 1859. At the time of the collision, she was in tow of a small propeller steam tug. This tug had in tow four canal boats, one lashed to each side of her, the other two astern, fastened together in the usual mode. The tug was proceeding with her tows from Vine street up the river to Poplar street, a distance of about 2,500 feet. Willow street, at the river, is distant about 1,100 feet northward from Vine street. The tows astern were heavily laden, and of unequal lengths. They were attached, each, to the tug, by a hawser of about eighteen fathoms in length. Of these two canal boats, the one on the western, or Pennsylvania side, was the Hehn. There does not appear to have been anything improper in the arrangement of the tug and her tows.

The collision occurred at mid-day, where nothing obstructed a view of the river. It was flood tide, with a light wind from the westward of south. Nearly opposite Willow street a sloop was anchored heading down the stream, her bow distant, perhaps, fifty or sixty yards from the shore, her stern a few feet further out in the river. Her position, with reference to the moving vessels, will determine the questions which are to be decided. Shortly before the collision, her captain had extended a line from her to the shore, or to a vessel moored at the wharf.

Neither the velocity of the tug nor her direction up the river appears to have been changed until after she had herself passed the sloop.

This direction would have taken the tug, with her tows, outside of the sloop as near to her as they could have passed her safely. To determine their direction, we must, first ascertain, if possible, the distance at which the tug herself passed the sloop. This distance, though not precisely deter-

in this case, they are of different lengths. A free steamer meeting a steam tug thus incumbered with tows must keep out of their way. Towage, which is an important part of navigation, could not be safely carried on under any different rule. On the other hand, persons concerned in towage must not occupy so much space as to obstruct unnecessarily those avenues of navigation which they unavoidably more or less incumber. In both respects, regard is due to the particular exigencies of their navigation which prevent the tow from being always in wake. A small tug, with tows astern, approaching a vessel at anchor so as to pass her at a distance of less than fifty feet, cannot, under ordinary circumstances, expect any vessel having a free choice of direction to pass between herself and the vessel at anchor. In such a case it may be the duty of the navigator of the tug to consider the unavoidable tendency of her tows to diverge from their course, his duty may require him to prevent this tendency from carrying them out of her direction in any such manner as to increase the width of the whole space occupied.

To prevent their divergencies from increasing this width he may sometimes very properly keep them upon a line inside of her wake so as to bring them somewhat nearer to the vessel at anchor.

If this can be done safely with reference to the vessel at anchor, it may be the best course of navigation in all other respects. In the present case, the tug was to pass the sloop with so small an intervening space that no other vessel could have been expected to pass, of choice, between them. If she had allowed her tows to diverge outwardly to a greater than her own intended distance from the sloop they might, with herself, have occupied more than a fair portion of the river. This was prevented by keeping them a little inside of her wake. To this relative position of the tows, no other vessel in the river than the one at anchor could object; nor could she object if they were not brought in dangerous proximity to her. The conclusion which I deduce from the testimony is, that the tug passed the sloop at a proper dis-

tance of between twenty and forty feet and that, if the approach of the colliding vessel had not occurred the tows would have passed the sloop somewhat, but probably not much, nearer. Their hawsers were tight, and they would have sufficiently obeyed their helms to admit of some regulation of the distance at the time of passing.

The colliding vessel, the steamer Anthracite, was a small freighting propeller twenty-three feet in width, of the burden of one hundred and twenty tons; she was coming down the river, and until she approached the sloop at anchor, was in a direction which would have taken here between the sloop and the city wharves. The captain of the Anthracite was at her helm. In approaching the sloop he perceived her line out across his intended course, and, therefore, changed his intention of passing her on that side. In altering his direction, he inclined gradually outward, intending to take a new direction parallel to his former course, and not farther from it than would enable him to clear the sloop on her outer side. He thinks that the first slight variation of his course occurred when he was about five hundred feet from her. He changed it so gradually that when only about twenty feet from her, he appeared when looked at from her deck, to be *rounding her stern.* So her captain testifies; the captain of the Anthracite says that he discovered the tug when he first altered his course. He then formed and executed the intention to pass between the sloop and the tug. He did not observe the tows astern until too late for any change of this purpose.

The speed of the approaching vessels is variously stated by the witnesses. The sum of the velocities in opposite directions cannot have been less, I think, than six miles in an hour. If so, the length of a tightly-stretched eighteen fathom hawser would have been passed in ten seconds. The tug, before the Anthracite passed her bow, had passed the sloop. The Anthracite would, therefore, have cleared them, although there had not been sufficient space between them for the purpose when they were opposite to each other. But, while the

space for passing the tug was thus enlarged, a part of the ten seconds was consumed. There was a corresponding contraction of the space in which the tows astern and the Antracite were advancing to meet each other.

As a propeller, she would obey promptly her helm. But, in the space which remained, no change of helm would have enabled her by anything short of a miracle, to have cleared the tows. The conduct of all parties proves that, from every direction, a collision appeared to be inevitable, though, as usually happens, persons who saw only the last stages of the unfortunate occurrence entertained erroneous impressions as to its cause.

The cause of the collision was the manœuvre of the captain of the Anthracite in attempting to pass between the sloop and the tug. Had the tug been without any tows astern, the relative positions and velocities were such that he would have succeeded in the attempt. But, it by no means follows that the attempt would not have been culpably perilous, though there had not been any tow astern. From his position, he was not able to measure accurately with his eye the distances of moving objects ahead. His testimony is loose and inaccurate as to distances in the line of approach where a very small difference might have brought him into collision with either the tug or the sloop. In the transverse distances he was not less liable to mistake. He thought that the distance of the tug from the sloop in passing her was about seventy-five feet. One of his hands thought so likewise. But his mate thought this distance fifty feet. The captain of the sloop thought it thirty or forty feet, and the captain of the tug, as we have seen, says that it was only twenty feet. Where human life, to say nothing of property, was at risk, such differences were extremely critical in a case in which, though his impressions had even been accurate, certainty was impossible. But, this point is not material, as the cause must be decided with reference to the actual fact that the tows were astern.

The captain of the Anthracite cannot be justified, or excused, for taking his course in the new direction without having seen the tows. He might have stopped his vessel until he saw whether the way was clear, or might have passed farther out into the river where the channel seems to have been clear. But, he could not properly advance in a new direction without seeing that his track would be unobstructed. Every navigator, in taking an optional new course, is bound always to look out beforehand for everything that may be encountered in the new direction. This navigator ought, more especially, to have looked out for such tows as are usually astern of such a tug as he actually saw ahead and advancing. His vessel is responsible, therefore, in precisely the same degree and mode as if he had actually seen the tows. If he had seen them, he could not have been morally or legally excused for laying his course in the direction which he took. Had the sloop not been there, he would have been bound to keep out of the way of the tug and her tows, not merely because the tug was an *incumbered* and his own a *free* vessel, but also because he was changing his own course. But the fact that the sloop was a fixed obstacle with reference to whose position his course was to be changed renders the definition of his duty more precise. We are to suppose him to have seen the tows. Had he done so, he would have seen that they were inside of the tug's wake. He was bound to know that they might probably be inside of it, and that, if not already inside, they were liable at anytime to a divergency in this direction. Without entering thus minutely into particulars, it suffices to say that this tug, having tows astern, was herself so near to the sloop as to have, on the Jersey side of the sloop, not only the actual, but the *apparent inner* track. Therefore, the captain of the Anthracite, when he attempted to pass in this track between the sloop and the tug, violated the rule of navigation, and rendered his vessel answerable for any damage to the tug, or tows, which this unauthorized movement might cause.

Persons who were in the tug depose that for some time after they first became aware of the intention of the navigator of the Anthracite to pass outside of the sloop, they supposed that he intended to pass outside also of the tug and her tows. We may assume that the persons in the tows astern likewise had at first this belief. They had a right so to believe, because it was his duty to pass on their outside. He could not complain that they acted on the belief that he would, in this respect, observe the rule of navigation. These persons in the tows, as their danger was greatest, were naturally the first who discovered that he really was on the inner track and must run them down. The captain of the tow astern which was on the outer side, on making the discovery, seems, probably in some alarm, to have taken the place of the steersman who, until then, had been at her helm. The hawsers were then taut, and the tows had been steered without any previous deviation from their track which has been described. At this time, the captain of the outer tow, concurrently with the helmsman of the Hehn, made a movement which was intended to avoid, if possible, the approaching danger. What precisely they intended to do for this purpose, does not appear. The effect of what they did, appears to have been to bring the tows nearer to the Pennsylvania shore. Some of the witnesses describe the inclination as a slight sheer towards the sloop. Upon this movement of the tows, they were first discovered by the captain of the Anthracite. He immediately threw off two-thirds of her head of steam. He could not then have changed his direction, because it would have been too late to attempt to proceed outwardly across the tug's bow. A collision with her would have been more dangerous than with the tows. In the meantime, the tug had pursued her course, her captain unaware of the danger until she had passed the stern of the sloop and was, perhaps, nearly opposite the bow of the Anthracite.

The course of the Anthracite was then, for the first time, perceived by the captain of the tug, who, when ten or

fifteen feet beyond the stern of the sloop, gave the signal to stop the engine of the tug, which was obeyed by her engineer. The captain of the tug, speaking of the Anthracite, says, "I saw then that she was going to try to go between me and the sloop, and I stopped the tug, knowing that she (the Anthracite) had not room to get through between my tow and the sloop." No sooner was the engine of the tug stopped than the Anthracite was abreast of her. The danger, if there had been any, of a collision between them, was over. The captain of the Anthracite then stopped and backed her engine. In the meantime, when the tug's engine had been stopped, her hawsers which held the tows were slackened as her speed was checked, and, according to the testimony, dropped into the water. When the resistance of the hawsers ceased the former slight sheer of the tows towards the sloop was changed into a more decided inclination, which the witnesses call a *rank* sheer towards her. The helms of the tows were with difficulty changed in time to prevent the Hehn from running into the sloop. They were at one time very few feet apart. In the meanwhile, the Anthracite, notwithstanding the backing of her engine, had been borne forward by her previous headway, and struck the Hehn, so that she sank in a few minutes.

Testimony which, standing alone, might have induced a belief that one or both of the tows astern had no helmsman at his post is conclusively contradicted. A steersman was constantly at the helm of each of them. As is frequently the case with such craft, the steersman of each of them was an inexperienced person. The proper inquiries, however, are not as to the skill of the boatmen as navigators, or their want of it, but as to their acts or omissions. If, however, their general skill were, for any reason, material, the fact would appear to be that before anything which has been thought questionable occurred, the captain of one of the tows had himself taken his own helm, and assumed the direction of the steersman at the helm of the other.

It has been argued that a mistake occurred on the part of

the boatmen in bringing the tows nearer to the sloop, and thus narrowing the space through which the Anthracite was to pass. Much of the testimony of the nautical witnesses on the subject is of little or no importance, as they did not know that the increase of the sheer just before the collision was consequent upon the relaxation of the tension of the hawsers when the progress of the tug was checked. But the steersmen of the tows had previously given to them an inclination in this direction without which the tendency which caused the sheer would, perhaps, not have existed. The argument has assumed, therefore, that, if the tows had been properly steered they might have cleared the Anthracite.

If this argument were available for any purpose, it would not, in a Court of Admiralty, exonerate the Anthracite for having improperly taken the inner track. The utmost effect of the argument would be to induce the court to divide the loss, according to the admiralty rule, equally between the tow and the Anthracite.

The testimony shows, however, as I think, that a collision could not have been escaped by any measure that could have been executed on board of the tows. I very much doubt if those who managed them at the crisis of peril erred in judgment in bringing them closer to the sloop.

The Anthracite was in the wrong track, she would readily obey her helm, as has been stated. Her proper position being in an outer track, the most prudent course may, perhaps, have been to give her, until the latest moment, an opportunity to pass, if possible, outside. To run in towards the sloop, would not cross the proper track of the Anthracite, and might, perhaps, afford her such an opportunity to get into this track.

At such a crisis, any movement made under an assumption that a free steamer, or perhaps any other free vessel, in a wrong course, will continue in it, is almost always more dangerous than a movement which may tend possibly to enable her to correct her mistake. But the case, under this head,

may be disposed of without any decision as to the wisdom, or inexpediency, of this movement.

The general result of the evidence is that the only changes of direction or position of the tows which occurred brought them *nearer* to the sloop. Now, until their navigators perceived that the Anthracite was not going to pass outside of them, the nearer they came to the sloop, the greater, as has been explained, was the space, in the proper quarter, for the Anthracite to pass. When they perceived that she was not in her proper track, and that she was moving in a direction which would bring her between them and the sloop, they were at a crisis of such peril that, if, in their alarm and confusion they made any blunder, they were not responsible to the party who caused the peril, either for the blunder or for its consequences; that such a period is one of exemption from responsibility for errors of judgment thus caused is familiar doctrine in courts of admiralty. Fearless wisdom in the conduct of persons thus in peril cannot be required for the protection of a party in the wrong from the consequences of his own fault.

Therefore, without deciding whether an error of judgment, in this respect, occurred in the time of danger or not, I do not think the case a proper one for a division of the loss between the colliding vessels. The Anthracite is, I think, wholly responsible for having determined her course in the new direction, without having seen the tows and kept out of their track.

My only doubt under this head has arisen from the testimony of the witness Welsh, who was in the canal boat on the inner side of the tug. He deposes that the space between the outside of this boat and the sloop in passing her was twenty-five or thirty *yards*, thus apparently confirming the two witnesses in the Anthracite who have deposed that the distance was about seventy-five feet.

In view of the small width of the Anthracite, and less width of other craft in the river, I should have thought that if the clear intervening space had exceeded fifty feet, it should perhaps have been kept clear for the passage of such craft.

In that case, the plan adopted of keeping the tows which were astern inside of the wake of the tug might have been improper, such a fault in their navigation would not have excused the fault of the captain of the Anthracite in passing into their track, as he did, without even seeing them; but it might have induced a division of the loss. I am not at liberty to conjecture that the witness Welsh when he mentioned *yards* may have intended to say *feet*. I hesitated, however, whether I would not express a desire that he should be re-examined in court in order that his meaning might be precisely known, and that his capacity thus to measure such a distance might be tested by some standard with which it could be compared.

But this course would perhaps have occasioned such delay as to prevent the hearing of an appeal from the court's decision until after the present spring. For the reasons which have been stated in the early part of this opinion, I think that there is a decided preponderance of evidence against the testimony of these three witnesses as to the distance in question. I therefore do not defer my decision on this account.

Decree for libellant with costs.

ON APPEAL to the Circuit Court, Judge Grier held that the cause of the disaster, as appeared to him from the evidence, was directly participated in by the negligent or unskilful steering of the canal boat. The case was, therefore, referred to the clerk, as commissioner, to report the amount of damage, if any, to the propeller. That to the tow had been previously ascertained.

In his opinion he questions the applicability to the case of the rule that a free steamer meeting a tug encumbered by tows must keep out of the way, and cites New York, etc., *v.* Philadelphia, etc., 22 Howard, 472, where the existence of the rule is denied altogether. Admitting its existence, however, he does not understand that those in charge of such boats are absolved from the ordinary duties of navigation, but rather that their vigilance should be augmented in proportion to the embarrassments they have to encounter.

DISTRICT COURT. MARCH 29, 1860.

RENDITION OF FUGITIVE.

THE UNITED STATES *v.* MOSES HORNER.

Constitutionality of act of Congress of 18th September, 1850. Identification. Alteration in certified record.

CASE of Moses, sometimes called Moses Horner, claimed as a fugitive from labor by Charles T. Butler.

CADWALADER, J.

The claimant produces the copy of a proceeding in a court of record in Virginia, upon his application made conformably to the provisions of the tenth section of the act of Congress of 18th September, 1850. This copy is duly certified according to the requirements of the act of 26th May, 1790. An objection to its reception as evidence has been founded upon a suggested partial alteration in the latter part of the surname of the alleged fugitive wherever it occurs in the document. The means of identification of this party in his Christian name, in the name of the alleged owner, in that of the place where the service was due, and in the description of his person set forth in the record render exact precision on the part of the surname of trivial importance. There is nothing suspicious in the appearance of the document, and according to the decision in 11 Wheaton, 408, there is no legal reason to presume that the alteration, if there was one, was made after the record was officially certified. The transcript, therefore, was received as evidence. In the record the conditions prescribed in the tenth section of the act of 1850 appear to have been fulfilled. It certifies the escape of the party, and that he owed service to the claimant, and contains a sufficient description of his person.

Under that section of the act the effect of the exhibition of the transcript of this record is to leave no question for my consideration except that of the identity of the alleged fugitive. On this point the claimant has examined witnesses, who, with

means of knowledge the most ample, testify positively to the identity of the person claimed. This is encountered by the contradictory evidence of one witness only, of no comparative weight.

The Supreme Court, in the case reported in 21 Howard, 506, 526, has expressed an opinion that "the act of 18th September, 1850, is in all of its provisions fully authorized by the Constitution of the United States." The latitudinarian tendency of the argument in this case might, therefore, perhaps, have been properly repressed by the Court. As this was not done, it ought to have been passed over without an expression of regret.

It is my duty to award a certificate to the claimant of his right to take the party according to the provisions of the acts of Congress.

DISTRICT COURT. JUNE 3, 1860.

RENDITION OF FUGITIVE.

THE UNITED STATES *v.* JEREMIAH BUCK

A fugitive slave, having been brought by the marshal, under a warrant of arrest, before the Circuit Court, the case was heard, and a certificate, whose contents were comformable to the requirements of the act of 18th September, 1850, authorizing his removal to the State from which he had escaped, was delivered to the claimant. The claimant having afterwards made an affidavit that he apprehended a rescue, the marshal retained the fugitive in custody, placing him in charge of certain deputies, or assistants, who, when engaged in removing him, were obstructed by the defendant. The acts of obstruction constituted, or included, an attempt to rescue the fugitive from custody. When this occurred, neither the claimant, nor any private person as his agent, was present. *Held:*

1. That for the purpose of the removal of the fugitive, and for incidental purposes, the certificate had established conclusively the relation of the claimant to the fugitive to be that of a proprietary master to his servant; that the subsequent custody of the marshal was lawful only in consequence of the master's affidavit, and might have been terminated by him at any time; that if it had been thus terminated, or had been interrupted, or had never taken effect, the right of custody would have been in the master alone; that the marshal's custody, while it continued, was not incompatible with any reasonable intervention, control, direction, or participation of the master

in which the marshal might acquiesce; but that the custody, unless actually assumed by the master, was, through his affidavit, continued in the marshal, in the same official character in which he had held the fugitive under the warrant of arrest; that the defendant might, therefore, have been indicted under the 22d Section of the act of 30th April, 1790, for obstructing the marshal as an officer; but that he was liable also to indictment under the 7th Section of the act of 18th September, 1850, for the attempt to rescue from the custody of the marshal and his assistants.

2. Under an indictment for such an attempt, the prosecution may be maintained without the adduction of any independent evidence that the fugitive owed service or labor, and had escaped from the State in which it was due.

3. Such an indictment contained averments of the issuing of the warrant of arrest, and of the subsequent proceedings, including the certificate and affidavit. These averments were preceded by allegations that the fugitive had escaped, and that he owed, in the State from which he had escaped, service or labor, to the claimant. *Held:* that the enactments of the law of 18th September, 1850, as to the conclusiveness of the certificate, rendered these preceding allegations matters of mere inducement, and that, the certificate having been produced in evidence, no independent proof of them was required in order to sustain the prosecution.

4. Such a prosecution is not maintainable unless the defendant acted "knowingly and willingly." But his only ignorance that can excuse him is ignorance of the existence of the custody or of its lawfulness. Where he might, upon inquiry, have readily known the truth, his omission to inquire is evidence from which his actual knowledge of the truth may be inferred. This is particularly the case where the custody is official.

5. A court of the United States ought never to sit with its doors of entrance closed, so as to prevent publicity in its proceedings. But, its police must be maintained. Where the court has not prescribed any general rule, or made any special or particular order on the subject, the specific duty of the marshal to maintain and regulate its police according to law is an incident of his general duty to attend the court. When, during the pendency of a particular proceeding, there is reason to believe that an unrestricted admission of persons of a known class or association would endanger the security of the administration of justice, or, in any manner prevent the police of the court from being properly maintained, the marshal, without excluding absolutely such persons as a class, may adopt prudential measures to prevent their indiscriminate admission, regulating the exercise of his discretion so that their exclusion is not carried beyond the exigency of the particular occasion.

6. In a criminal case the jury *can* judge of the law as well as the facts. But where they cannot know the law otherwise than as it may be stated by the Court their duty is to believe that the Court states it correctly.

INDICTMENT under act of Congress of 18th September, 1850, for attempt to rescue fugitive slave.

CHARGE of the Court.

CADWALADER, J.

The government of the United States exists through a delegation of specifically defined powers, which the several States have yielded upon certain conditions. The rightful continuance of the government is dependent upon the faithful performance of these conditions. One of them is that fugitives from justice, found in a State into which they have fled, shall be delivered up for removal to the State having jurisdiction of their alleged crimes. Another condition is that slaves escaping from one State into another shall be surrendered. In the case of a fugitive from justice, the surrender is to be made on the demand of the executive authority of the State from which he fled. In the case of slaves, it is to be made upon a claim by the party to whom their service or labor is due. In legislating for the fulfillment of these two constitutional conditions, Congress has never assumed the power of disposing at pleasure of the custody of a fugitive of either kind. The Constitution would not have sanctioned any such arbitrary legislation. The fugitive from justice has been surrendered into the custody, not of an officer of the United States, but of an agent or duly accredited representative of the State, by whose executive authority the demand has been made. The fugitive slave cannot, unless at the desire of the claimant whose right has been established, be delivered into any other custody than that of such claimant. When, at his desire, the fugitive is delivered into the custody of an officer of the United States, this officer's custody is temporary and its purpose limited. It exists only for the protection or security of the right which has been established, and cannot be exclusive of the control of the possessor of such right. This right is that of a proprietary master of the fugitive. The legal importance of keeping this distinctive character of it in view will be seen hereafter.

In the first legislation of Congress, under these two clauses of the Constitution, the subjects of both were provided for in

a single statute. This act, which was passed on the 12th February, 1793, has not been followed by any further legislation, so far as the surrender of fugitives from *justice* is concerned. The jurisdiction under this head is not exercisable under the act by the judges or officers of the United States, but by the governments of the several States. The jurisdiction and powers for the surrender and return of fugitives from service or labor were vested by the act in judicial officers of the United States, and concurrently, in certain local magistrates of the several States.

This legislation on the subject of fugitive slaves was extended by the act of 18th September, 1850. So far as this act has modified or superseded the previous law, no jurisdiction or authority is vested in any State officer or magistrate.

The owner of a fugitive slave is not bound to proceed under either of these laws. He may follow the slave into the State into which he has escaped, and may, without any legal process, arrest him there; and may, without any judicial certificate, or other legal attestation of the right of removal, carry him back to the State from which he escaped. All this may be done lawfully. But, if the owner does not, under one act, or the other, obtain a certificate of his right of removal, he becomes liable as trespasser, for the arrest, detention, and removal, unless he can prove the escape, and that the fugitive owed him service or labor in the State from which he fled.

In a proceeding under the Act of 12th February, 1793, the arrest of a fugitive slave was made without any warrant or other process. He was taken by the claimant, or his agent, before a judge of one of the courts of the United States, or a local magistrate, who, upon the adduction of the requisite proof, gave a certificate which served as a warrant for the removal of the fugitive to the State or territory from which he had escaped. This act contained no express provision that the certificate should have any conclusive effect as proof of the right of removal. The Act of 18th September, 1850, provides that the alleged fugitive may be arrested by the claimant, either without process or under a warrant issued by court or judge of

the United States, or by one of the commissioners of a certain description, appointed by designated courts of the United States. It vested in any one of these commissioners a jurisdiction concurrent and co-extensive with that exercisable by a court of the United States, or one of the judges of such a court. This act required the marshals of the United States and their deputies to obey and execute all warrants and precepts issued under its provisions when to them directed. It imposed a pecuniary penalty for any refusal or neglect to receive or execute such process, and made the marshal, in case of an escape, with or without his assent, after arrest, liable on his official bond for the value of the fugitive, according to a prescribed standard. The commissioners were authorized, within their respective counties, to depute, by writing, one or more suitable persons, from time to time, to execute such warrants and other process as might be issued by them in the lawful performance of their respective duties. The commissioners, or the persons thus deputed by them to execute process, were authorized to summon, and call to their aid, the by-standers, or posse commitatus, when necessary. Their warrants were to run and be executed anywhere in the State within which they were issued.

In a proceeding conducted according to the provisions of this act, the alleged fugitive, whether arrested under a warrant, or without process, is brought before a court or judge of the United States, or a commissioner whose duty it is to hear the case of the claimant in a summary manner. If the claim is established, the court, or judge, or commissioner, delivers to the claimant or his agent, a certificate setting forth substantially the facts established, and authorizing him to use the reasonable force and restraint necessary, under the circumstances of the case, for the return of the fugitive to the State whence he escaped.

This law makes the certificate thus delivered conclusive of the right to remove the fugitive to such State, and enacts that it shall prevent all molestation of the claimant by any process issued by any court, judge, magistrate or other person

whomsoever. The certificate as described succinctly in the 4th, and more fully in the 6th section, answers a two-fold legal purpose. It ascertains the claimant's right to remove the fugitive, and constitutes, or includes, a warrant for his removal.

In a prior stage of the cause, I had occasion to express an opinion, which I now repeat, that, under an indictment for an offence against this law committed after such a certificate has been delivered to the claimant, its production in evidence renders independent proof that the fugitive owed service or labor to the claimant, and that he escaped from the State in which it was due, unnecessary on the part of the prosecution, I also expressed an opinion that though such an indictment contained allegations that he had escaped, and owed the service or labor, followed by an averment that the certificate had been awarded, the enactments of the law of 1850, as to the conclusiveness of the certificate, rendered these preceding allegations matters of mere inducement, of which no independent proof was required, in order to sustain the prosecution. I still am of this opinion. The question whether the alleged fugitive was a slave or not cannot be tried under such an indictment.

Where the claimant, after the certificate of his right has been issued, makes affidavit that he has reason to apprehend a forcible rescue of the fugitive before he can be taken beyond the limits of the State in which the arrest was made, the act requires the officer who made it to *retain* the custody of the fugitive, and remove him to the State whence he fled, and there deliver him to the claimant. The act also authorizes and requires the officer to employ and retain for this purpose, at the expense of the United States, as many persons as he may deem necessary to overcome such force. In a clause which defines the rate of compensation for such service, and of the allowance for expenses, the persons thus employed by the officer are designated as his assistants. The standard here prescribed is that of the compensation and allowance in cases of tranportation by the marshal of persons charged as criminals.

In the present case, the testimony shows that, under a warrant of arrest, a fugitive slave had, under this act, been brought in the lawful custody of the marshal before a judge of the Circuit Court, that the right of the claimant had been established, and the certificate prescribed by the act of 1850 had been issued, when the claimant's affidavit that he had reason to apprehend a forcible rescue was regularly made, that a copy of this affidavit was in the hands of the marshal, or his principal deputy, that the marshal, therefore, conformably to the provisions of the law, retained the fugitive in custody, and was in the act of removing him from the court house, when the occurrences on which the prosecution is founded took place.

These occurrences were very remarkable. They took place in the public street, in the face of day, in open defiance of the law. The doorway leading from this court into Fifth street is distant not more than about sixty yards from the point on the north side of Chestnut street, a little westward of Seventh street, where the defendant was arrested. The intervening space is occupied, on the same side of Fifth street, by offices of the police of the city. There was in the street a crowd chiefly composed of colored persons. More than fifty officers of the city police were stationed there to keep the passage clear. These officers wore their badges. This was the state of things when the fugitive was brought by the marshal, or his principal deputy, through the Fifth street doorway, and placed in a carriage. Three deputies or assistants of the marshal, including his principal deputy, took seats inside of the carriage, and another assistant or deputy took a seat by the driver. The carriage then got under way towards Chestnut street. An immediate movement from the eastern footway towards the street pavement appears to have been made by colored persons, who crowded forward in such a manner as to impede the progress of the carriage. An attempt to stop it was made when it had advanced only a few paces. Before it reached Chestnut street, this attempt had been repeated once or twice, if not three times. The speed of the horses was increased as they approached

Chestnut street, and was becoming rapid as their heads were turned westward in order to pass up that street. At this point, the portion of the crowd which had been in the carriageway of the street appears to have been left behind, but to have been following closely in the rear. The carriage would probably have soon left the great body of them far behind, if its progress had not been again stopped in a more violent manner than on the previous occasions. Here some colored persons, who rushed from both footways into the carriageway, seized the heads of the horses on both sides, and forced them on the sidewalk, against an iron awning post, when several arrests, including that of the defendant, were made by officers of the city police. The period from the time at which the carriage left the door of the court house to the time of their arrest was probably not more than one or two minutes. There had been confusion and noise during the whole of this period, the colored persons crowding towards the carriage and exhibiting great excitement. Several witnesses heard the word "rescue" shouted. Robert Williamson says that he heard it shouted loud by more than one voice before the carriage reached the corner of Chestnut street. Edward G. Wood and Robert Wilson state that White, one of the men arrested, called "rescue." Wilson says that White called rescue before Buck, the defendant, came up. Seven witnesses, namely, Trefts, Robinson, Brodie, Wood, Barry, Axe, and Williamson, positively identified the defendant as one of the three principal actors in the scene which occurred when the horses were forced upon the pavement. Mr. Wood, Robert Williamson, Axe, and Barry describe this occurrence particularly. The clearest account seems to have been that of Mr. Wood. According to their testimony, White seized the horses on one side and the defendant on the other, while Green took hold of the traces and with an uplifted cane was striking at the driver. Barry describes the defendant as the person most active in hauling the horses on the footway. Mr. Axe, the policeman who arrested him, describes him as violently excited and exerting great strength in keeping his hold on their heads. White and Green

were arrested at about the same time. What occurred afterwards is not important except that their arrest seems not to have prevented a fresh outbreak of similar violence. The crowd moved up Chestnut street and the disturbance continued. If you believe the witnesses for the prosecution, and give due effect to their testimony, you will probably have no doubt that the defendant, at the time of his arrest, was engaged, with others, both in obstructing the execution of process by the marshal, and in attempting to rescue from custody the fugitive whom the marshal's deputies had in charge. The latter, as I will state hereafter, is the only offence for which the defendant is on trial.

The defendant is not thus guilty unless he thus acted knowingly and wilfully. He, however, cannot allege ignorance of law as an excuse. No man can ever allege this excuse. Every person is bound, and is presumed, to know the law. Otherwise the pretence or excuse of ignorance of it would be urged in every case. The only ignorance that can be alleged in excuse is ignorance of the fact which renders an act unlawful. In this case, the only excuse which could be admitted under this head is that of ignorance that the fugitive was in lawful custody. The question of such ignorance in cases under the fugitive slave laws has usually arisen where an alleged fugitive was in the hands of the claimant, or his agent, that is to say, in the hands of private persons not officers of the law. The Circuit Court of the United States for the Ohio District have decided many such cases, particularly under the act of 1793. In two cases that Court used words which I will quote: "To bring an individual within the statute, he must have knowledge that the colored persons are fugitives from labor, or he must act under such circumstances as show that he *might* have had such knowledge by exercising ordinary prudence." (4 McL. 420; 6 McL. 259.) Without stating any rule in this precise form of words, I instruct you that if the defendant, from circumstances within his observation or means of immediate inquiry, might readily have known the truth, a belief of his actual knowledge of it may be reasonably deduced. In cases of mere

private custody of an alleged fugitive, the application of such a rule may, according to varying circumstances, be difficult or easy. But there seldom can be difficulty where the custody is that of an official person. The true character of such a custody, if not apparent or known, may usually be ascertained without any difficulty by a person desirous of knowing the truth. In this case, the place, the persons, and the circumstances indicated that the custody was both lawful and official. Could there have otherwise been any doubt it would have been removed by the fact that the city police, with their badges exhibited, were on the spot. They would, if there had been anything unlawful, have been the persons to redress the wrong. If you believe the testimony, they must have been seen to be protecting, or endeavoring to protect, the carriage and those in it from such violence as that in which the defendant was immediately afterwards engaged. You probably, therefore, would have no difficulty in finding that he acted knowingly and wilfully, if the case rested upon the testimony for the prosecution alone.

But the defendant has examined a number of witnesses, as persons in the same situation as himself in respect of the occurrences in controversy, every one of whom, so far as I remember—certainly almost every one—knew the general character and particular description of the case that was pending; knew that the person put into the carriage was the fugitive or alleged fugitive; knew that he was in custody of the marshal; knew the person of either the marshal himself, or of one of the deputies who accompanied the prisoner; and knew the court room and the marshal's office, and, of course, knew the doorway leading from it into the street. [Some parts of the testimony under this head were here particularly quoted by the Court in the words of the respective witnesses.]

The defendant's testimony on other points is of no materiality that I can perceive. [Here the Court reviewed this testimony in detail, comparing it with the counter evidence.] If the jury take a different view of the evidence, the decision upon the facts is for them, and not for the Court. This remark

applies to all the facts in the cause. If there is any reasonable doubt concerning them, the defendant is entitled to the benefit of it. The testimony as to his general good character should avail him so far as it may serve to create any reasonable doubt of his guilt, or to increase any doubt of it that might otherwise have existed.

A suggestion on behalf of the defendant is made in the form of a complaint urged against the marshal, or some of his deputies, for keeping colored persons out of the court room during the hearing of the case of the fugitive slave, though white persons were admitted without objection. I do not understand the bearing of the testimony under this head as matter of defence. If the complaints were well founded, it would not justify, or excuse, an assault upon the officers, much less an obstruction of the execution of legal process, or an attempted rescue from official custody. Independently of any question in this cause, the subject is, however, of great importance; and, as it has been publicly discussed, should not be passed without notice.

If colored persons, as a class, were excluded from the court room for any reason which would not, under like circumstances, apply to white persons, a mistake was committed. The marshal had no right or power to exclude them for any such reason. I cannot believe that he or his deputies were so ignorant of their duty that such a mistake was committed. But if a class of persons, white or colored, are, for any reason, dangerous attendants upon a court, so dangerous as to interfere with its police and security, some discrimination as to their *unlimited* admission may, from necessity, be exercisable while the danger continues. Courts of justice must be open; but their police must also be maintained. If a subject of judicial investigation is one as to which any known class of persons are too much excited in feeling to be able patiently to attend upon its discussion, an indiscriminate admission of all persons of the class would sometimes be very dangerous. [Here the Court exemplified this proposition in its possible application to cases other than that in question.] In the case of a fugitive

slave, the danger of admitting indiscriminately persons whose feelings might have prompted them to act like those who made the attack upon the carriage on the occasion in question, might endanger the police of a court. This danger, where it exists, the marshal, who maintains its police, cannot properly disregard. A discrimination of some kind appears to have been exercised by him on the occasion in question. Colored persons, including those who afterwards committed acts of illegal force, appear to have attended in great numbers, and to have endeavored to obtain admission into the court room an hour before the time at which the court was to be opened. Had they been indiscriminately admitted at that time, the court room and its avenues would probably have been occupied by them to the exclusion of all other persons. What may have been observable during that hour of the temper and feeling of these colored persons, what may have been known of the character or former conduct of any of them, we could not here inquire. But the events of the afternoon prove that there *may* have been sufficient reason for the marshal's refusal to admit them indiscriminately in the morning. We have no means of inquiring into the reasons by which his discrimination was particularly regulated. The testimony shows that colored persons of good character, whose usual deportment was quiet and orderly, were not able to command their feelings on the day in question so as to abstain from acts of lawless violence. This proves that any exercise of discrimination on his part must have been attended with embarrassing difficulties and possibly dangers. That colored persons generally were excluded from the court room seems to be true. That they were not excluded *indiscriminately* is, however, not less true. In the course of the testimony, it came out casually that the marshal himself directed the admission of one to whom entrance had been refused by the deputy; and that the deputy, without the marshal's order, admitted another. There is no reason to believe that others may not also have been admitted. One witness, the colored clergyman, who was refused admittance, says that he had "quite a squabble" with one of the marshal's

deputies. This witness admits that his feelings were deeply interested. How far he may have been excited, whether he may have used language of a tendency to excite the feelings of others, are inquiries which would have been out of place here. But such considerations may not have been improperly entertained by the marshal on that occasion. Besides his duty to maintain the police of the court, he had the custody of the fugitive and was liable for an escape though he had been forcibly rescued. We therefore cannot, in a collateral proceeding like the present, ascertain whether his conduct was, or was not, wisely regulated in the precautions which he used in order to prevent an indiscriminate admission of all persons into the court room. Had a rescue been the result of his omission to adopt adequate precautions, the case might have undergone an investigation in which his neglect would not have been thought excusable. It is fortunate for the jury, and for the country, that we are not now engaged in such an investigation.

The duty of stating and explaining the law of the case remains to be performed. This duty devolves upon the Court. In a criminal case, the jury *can* judge of the law as well as of the facts. But where the jury cannot know the law otherwise than as it may be stated by the Court, their duty is to believe that the Court states it correctly.

If there existed no law for the punishment of an act like that of which the evidence tends to prove this defendant guilty, the United States would cease to have a government. No government can be administered unless its laws can be enforced, and resistance of their execution punished. Under the government of the United States, large standing military garrisons posted throughout the land in strong fortresses have not been thought necessary for the enforcement of the laws. No such military organization will become necessary so long as the government's judicial organs, which designation includes juries as well as courts, fulfill their duties to the Constitution and the laws.

The only question of law which has not already been suffi-

ciently considered is, whether the present prosecution can be sustained under the indictment?

The act of 1793 imposed penalties for obstructing an arrest by the claimant, and rescuing, harboring, or concealing the fugitive. But these were only pecuniary amounts, recoverable in a civil action by the claimant for his own benefit. Under this act, there was no official custody of an alleged fugitive slave except constructively during the hearing before the judge or magistrate. But, under the act of 1850, the proceedings may, at every stage of them, be conducted under legal sanction, and the alleged fugitive may, not only during the hearing, but before and after it, be in custody under legal process. This, however, as we have already seen, is an optional method of proceeding. The claimant in person, or by an unofficial agent, may still make the arrest without process, and bring the fugitive before the court, or judge, or commissioner; and, after the receipt of a certificate under the act, may take the fugitive into his private custody, without asking official protection of any kind. The 7th section of the act, in view of these alternative and optional modes of proceeding, made it a criminal offence knowingly and willingly to obstruct, hinder, or prevent the claimant, his agent, or assistants from arresting the fugitive *with or without process*, or to rescue or *attempt to rescue* him from the custody of the claimant, his agent, or assistants, when arrested, or to aid, abet, or assist the escape of the fugitive from the claimant, his agent, "or other person or persons legally authorized *as aforesaid*," or to harbor or conceal the fugitive so as to prevent his discovery and arrest after notice or knowledge that he was a fugitive from service or labor.

The indictment is founded upon this enactment. It charges an attempted rescue of the fugitive. The first count, after stating the warrant of arrest, and subsequent proceedings to the granting of the certificate, avers that the affidavit of apprehension of a rescue was afterwards made by the claimant, and lays the offence as an attempt to rescue from the custody of the marshal and the persons employed by him according to the

provisions of the act. The second count, not mentioning the affidavit, lays the offence as an attempt to rescue from the custody of the claimant, and certain persons described as his assistants, who, in fact, were the marshal and persons mentioned in the first count. These two counts are properly joined in the same indictment. But it does not follow that a verdict of guilty upon both can be proprly found. If the claimant, after the receipt by him of the certificate, had not taken the affidavit, your verdict, if rendered against the defendant, would have been properly found upon the second count. But, as the affidavit was taken, and neither the claimant, nor any unofficial agent on his part, was actually present when the offence was committed, the verdict, if against the defendant, should, I think, be a verdict of guilty upon the first count only.

The remaining inquiry, therefore, is, whether the prosecution can be supported upon the first count. On this point I had some doubt in an early stage of the trial. But this doubt has been removed; and I am now of opinion that the prosecution, so far as the case depends upon matter of law, can be maintained upon this count. The objections to this view of the question will be stated and answered. They depend upon an assumption of three propositions. The first is that an obstruction of an *officer* of the United States in the execution of legal process of any kind is indictable under the 22d section of the act of Congress for the punishment of crimes, passed on the 30th of April, 1790, before any legislation of the United States, as to the recapture of fugitive slaves, and that the defendant, if guilty of any offence, was indictable under that act. The second proposition is, that when the claimant, after the receipt of the certificate, made the affidavit, the custody of the fugitive was in the marshal alone, and was, in law, an exclusively official custody. The third, stated partly as an independent proposition, and partly as connected with, or dependent upon the first and second, is that the 7th section of the act of 1850 does not apply to any interference with or obstruction or prevention of an officer of the United States in the execution of process, but was intended only for cases of

interference with or obstruction of private persons having a fugitive slave in lawful custody.

The first proposition, that this defendant might have been convicted under the act of 1790, of an obstruction of the marshal in the execution of process, is, I think, true. I do not think that this exempts the defendant from being liable also under the present indictment founded upon the act of 1850. The first proposition will, however, be considered, in order that its connection, or want of connection, with the two others may afterwards be discussed. The 22d section of the act of 1790 made it a criminal offence, knowingly and wilfully to obstruct, resist, or oppose any officer of the United States in serving, or attempting to serve or execute, any mesne process, or warrant, or any rule or order of any of the courts of the United States, or any other legal or judicial writ or process whatever, or to assault, beat, or wound any officer or other person duly authorized in serving or executing any writ, rule, order, process, or warrant, *aforesaid.* This section and some others of the same act, are prospective in their operation. The section applies, therefore, to obstructions of the execution of process by officers of the United States, acting under jurisdictions established by subsequent acts of Congress. In the language of Judge Washington, it includes all legal process in the hands of an officer of the United States. (3 W. C. C. 338.) His language, which I have only partially quoted, justifies the remark of Judge Curtis, in the year 1851, repeated in 1854, that "it embraces every legal process whatever, whether issued by a court in session, or by a judge, or magistrate, or commissioner, acting in the due administration of any law of the United States." (2 Curt. 639.) This remark, it is true, was made only in a charge to a grand jury; and, therefore, has not the authority of an expression of an opinion in the course of a legal adjudication. But the subject came soon after before the same judge in a judicial proceeding in which it was assumed, though not decided, that an attack upon the marshal while in custody of an alleged fugitive from service, could, if the indictment was properly framed, be made the subject of criminal prosecution

under this section of the act of 1790. It also appears that the subject had been for three years under the consideration of Judge Curtis, without any change in this opinion expressed by him originally in the year 1851. Independently of this authority, I should, upon the words of the act, and the authority of Judge Washington's opinion, have arrived at the same conclusion. I have, therefore, no difficulty in stating my opinion that any wilful obstruction of a marshal, deputy marshal, commissioner, or other officer of the United States, while executing a warrant of arrest under the fugitive slave law of 1850, or while in custody of a fugitive, in consequence of a claimant's affidavit, made after the certificate has been delivered to him, is indictable under the act of 1790. But, I am of opinion, as will appear more fully in considering the second proposition, that it is thus indictable only where the marshal is in the *actual* custody of the fugitive.

The second proposition as to the alleged exclusiveness of the marshal's custody has been in part anticipated at the commencement of this charge. The Constitution requires the delivery of the fugitive to the claimant, whose relation to him is that of a master to a servant. As a husband may retake his wife, a parent his child, or a guardian his ward, so a master may retake his servant wherever he may find him; and in the case of a servant of this description, may retain him in custody and under control. In defining the power and rights of the person to whom the service or labor is due, elementary rules of jurisprudence as to these domestic relations, contained in Blackstone's Commentaries (III, 4) have therefore been adopted by the Supreme Court as applicable to the interpretation of acts of Congress passed under this clause of the Constitution, and even to the interpretation of the constitutional provision itself. (16 Pet. 613; 5 How. 229.) A parent's or guardian's custody of his child, or a master's proprietary custody of his slave, may be assisted, promoted, enforced, or maintained by the custody of an official functionary. But, in an ordinary case, the assistance of such a functionary to the lawful custody of the master, does not supersede or annul it,

and, under the Constitution and laws of the United States, could not lawfully annul it. Consequently, though the marshal's custody of the fugitive in this case was official, so far as it extended, yet, it was not through any legal necessity, exclusive. It may have been exclusive in fact, but it was not, even then, independent of possible intervention by the master.

The act of 1850 makes it the duty of the officer, after the certificate issued, upon the affidavit of apprehension of rescue, to *retain* the fugitive in custody for the purpose of removal. The counsel on both sides agree that this word *retain* defines the character of the official custody, which must, for general purposes, be the same before and after the certificate. There is, however, a certain specific distinction which may, for particular purposes, be attended with important differences. Until the certificate is issued, the right of the claimant is undetermined. The period of the hearing of the case may be excluded for the present from consideration. In this period there can be no control or direction on the part of the claimant, and the custody of an officer must be subordinate to that of the court, or judge, or commissioner. The distinction to which I advert is between the custody which before the hearing may exist under the warrant of arrest, and the custody which may, after the certificate, be retained by the officer in consequence of the affidavit of apprehension of rescue. The warrant of arrest is legal *process* directed to the officer, which he is bound to return to the court or judge or commissioner. Whether the proceeding under this writ, until it is executed by an arrest, is under the exclusive control of the claimant is a question which it is not necessary to decide. When it has been primarily executed by an arrest, the claimant before it is returned to the court, or judge, or commissioner, may possibly have the right of abandoning the proceeding, and ordering the alleged fugitive to be set at liberty. Whether the alleged fugitive may not insist on being brought before the court, or judge, or commissioner is a point upon which it is not necessary to express an opinion. The claimant certainly cannot, for any other purpose than that of the absolute libera-

tion of the alleged fugitive interfere with the official custody of him between the time of arrest, and the time at which the process is returned to the court, or judge, or commissioner. Unless there is an absolute discharge, the officer must return it and bring in the alleged fugitive. To this extent the claimant, by taking out the process, has, until its return, surrendered or qualified the personal exercise of his alleged right as master. But, in this interval between the arrest and the return, the custody of the officer is, even to this extent, exclusive in those cases only where it is an *actual* custody. When he does not find the alleged fugitive, the claimant, if able to find him, can lawfully take him. If, after arrest, the officer dies, or becomes incapable of acting, or if he wrongfully refuses to retain the fugitive in order to return the writ, and improperly liberates him, the claimant may take or keep him as if there had not been any process. In these, and in other cases which might be specified, the claimant, at the peril of afterwards proving his ownership of the fugitive, may take him or may temporarily control and regulate the custody. This could not be done under process in an ordinary legal proceeding. Under the warrant of arrest, there may possibly be difficulties inherent in some of these questions. But, there can be no such complication after the certificate has conclusively settled the question of the right of removal. The marshal, or other official custodian—when the affidavit of apprehension of rescue has been taken after certificate issued—retains his former custody against all the world except the claimant; but he retains it for the exclusive protection and security of the claimant, whose concurrent or substituted control or custody of the fugitive cannot then be wrongful. The certificate is conclusive of the right of removal to the State from which the fugitive had escaped, and no tribunal can question its effect for the purposes of the removal; but, it is not like the warrant of arrest, returnable to the court, or judge, or commissioner by whom it was issued. It is not, like the warrant of arrest, process directed to the officer. It is a certificate in favor of the claimant himself. So far as it constitutes a warrant for the removal of the

fugitive, it is exercisable by the claimant whose right has been established. The custody of the marshal is, therefore, as between him and the claimant, auxiliary only. He is an official assistant of the claimant. In order to give the full protective benefit of his official character to the claimant, the act of Congress prescribes that the custody shall be not less official than under the former warrant of arrest. Nevertheless, the claimant in whose favor the certificate has been awarded, may at any time, discharge the officer, may act as the custodian of the fugitive while the officer is present. Questions may, indeed, arise, whether this can be reasonably done by a claimant who requires the continunace of the marshal's custody. But such questions can occur only between the officer and the claimant, and must be settled between themselves. Third persons cannot be concerned in any such question. The custody of the marshal, therefore, though it may be exclusive in fact, is not necessarily from its character, exclusive in law. Consequently, as I have already instructed you, an indictment which alleges an attempt at rescue from the custody of the officer and his assistants would not be supported by the mere production of the certificate of removal and affidavit of apprehension of rescue, and proof of a subsequent attempt to rescue, without the further proof, which has been adduced here, that the officer had, in fact, the custody when the attempt was made.

If the foregoing views are correct, a principal difficulty which might otherwise have been encountered in considering the third proposition, has been removed. This proposition is, that the 7th section was not intended to apply to an attempt to rescue from the custody of an officer of the United States, but was applicable exclusively to such unlawful interferences with unofficial custody as would not have been indictable under the act of 1790. When the words of the 7th section are carefully considered, their applicability to lawless interferences with such official custody as the other enactments of the statute authorize becomes unquestionable. The question specifically presented might be discussed on somewhat narrow, or on more extended views. The result of each mode of reasoning would,

perhaps, be the same. Under the narrower view, it is obvious that there might be cases of such attempts to rescue from official custody as would fail or be frustrated before they amounted to obstructions of the official execution of process. Such attempts would not be indictable under the act of 1790. According to the argument in this case for the defence, an attempt of this kind to rescue from private custody would be indictable, but the more aggravated offence of such an attempt to rescue from official custody would not be punishable. There is no probability that this can have been intended by Congress. But the question may, I think, be determined on the broader ground, that there is no distinction between an official and an unofficial custody under the 7th section of the act of 1850 except so far as the phraseology of indictments may require variation in order to adapt them to the specific distinctions of different cases under the act.

That this was the opinion of Judge Nelson appears from his charge to the grand jury, delivered at the October Sessions of 1851, in the Circuit Court for the northern district of New York. (2 Blatchf. App. 560.) I do not refer to what he said in such a charge as having the full force of judicial authority. But this charge serves to explain the form of the indictment afterwards found in the case of The United States *v.* Reed, Ib. 438. This indictment had been removed by certificate, from the District into the Circuit Court. In another case, the United States *v.* Cobb, in which the opinion of Judge Conkling, on a preliminary hearing is reported in 4 Amer. L. Jour. 458, a bill had also been found in the District Court; and, as I infer from a subsequent account of it, had also been certified into the Circuit Court. In each case, as we may infer from the reports which we have, the indictment was founded upon the 7th section of the act of 1850. Both cases arose from the rescue of an alleged fugitive slave on 1st October, 1851, at Syracuse. The rescue was from a deputy marshal who had him in custody under a warrant of arrest issued by a commissioner. This rescue had prevented any hearing from taking place. The case was, therefore,

that of a rescue from a custody of a character as official as any of which the existence under the act of 1850 can be recognized as possible. A motion was made afterwards to quash the indictment. This was about a year after the charge of Judge Nelson to the grand jury. The point now in question does not appear to have been made in the argument of the motion. It may, perhaps, have been reserved by counsel to be taken on the trial, or upon a motion in arrest of judgment. But attention must have been directed to it from the remarks upon it in the previous charge to the grand jury; and the reasoning and remarks in the Court's opinion (2 Blatchf. 467, 468) seem to cover the question and to affirm the validity of an indictment under the act of 1850, for a rescue from official custody.

The same view seems to have been tacitly assumed to be correct in the Christiana case in the Circuit Court for this district, under an indictment for obstruction of process, tried before Judge Kane after the decision of a well-known case arising from the same transaction in which there had been a prosecution for treason. (4 Am. L. Journal.)

Independenly of any reported case, I would have arrived at this conclusion upon the words of the act of 1850. It certainly makes the offence of preventing an arrest indictable, whether the claimant or those assisting him were endeavoring to make it "*with or without process*"; and the context shows a connection of these words with the subsequent specification of the other offences, including that of a rescue or attempt to rescue. Therefore, if the acts which are in question in this case had occurred before the hearing, the offence would have been indictable though the alleged fugitive had been in the custody of the marshal. Consequently, the official character of the custody was, in the primary stage of the proceeding, immaterial. We have seen that if there was any distinction after the certificate and affidavit, the official character of the custody was then, in law, less material. But the act seems, in this respect, to place them on the same footing, by enacting, in effect, that the officer shall, in this latter stage of the proceeding, retain his former custody. The rule must, therefore,

be the same in both stages, and the reason for its application in the latter stage is more forcible.

I am, consequently, of opinion that, if you take the view of the facts which the testimony appears to warrant, your verdict, so far as the law of the case is concerned, should be that the defendant is guilty on the first count, and not guilty upon the second count of the indictment.

Verdict accordingly.

DISTRICT COURT. JULY 18, 1860.

REVENUE.

IN RE THOMAS MELLOR & CO.

Remission of forfeiture of goods fraudulently invoiced. Duties of the Court and commissioner.

PETITION of Thomas Mellor & Co., praying for an inquiry into the circumstances of an alleged violation of the revenue laws, and for the transmission of the petition and the facts as they might be ascertained by evidence to the Secretary of the Treasury to the end that he might remit, etc. The application was under the act of Congress of March 3, 1797, Section 1.

STATEMENT.

The petitioners resided in Philadelphia, where they were largely engaged in importing manufactured woollen and cotton goods from Germany. The goods were purchased by them from various makers, and were then forwarded to John Heckerman at Bremen, by whom they were shipped to the petitioners. The invoices sent by Heckerman corresponded in quantity and price with those furnished by the manufacturers, except that an average discount on the cost of two and one-half per cent. allowed by them was increased in Heckerman's invoices to five per cent. Heckerman's invoices were alone exhibited at the Custom House, and it was claimed by the government that the transaction was to the extent of the increase fraudulent.

The petition admitted the irregularity, but claimed that it was offset by a Custom House commission of the same amount illegally imposed.

The claim arose on an importation of goods amounting in value to $512,689. The duties thereon amounted to $118,961.04. Two and one-half per cent. added to the goods would make an increase in value of $12,817.23, on which duties at the rate of twenty per cent. would be $2,951.53.

An action at the suit of the government was pending to recover the value of the goods according to the statute, etc.

CADWALADER, J.,

having considered the petition, made the following observations.

In cases like the present, I am always ready and willing to hear the witnesses in open court; but the counsel usually prefer the more convenient and equally regular practice of taking the examination before a commissioner in the form of depositions, and presenting them to the court. The effect of this practice is occasionally to present incompetent evidence, which, if originally offered in court, would not have been received, and which, therefore, must be rejected from subsequent consideration. In this case the evidence of the applicant's general reputation, etc., and some other testimony must be excluded.

The act of Congress requires that I should report not the evidence adduced, but the facts proved, meaning, of course, the material facts only. In some cases, when the question to be determined is very simple, and the testimony taken serves the purpose of a statement of facts, this testimony has been returned to the Treasury Department without any distinct report as to its effects. Such a course would not be regular or proper in this case. But I will, in addition to my report of the facts, transmit the whole of the evidence as taken before the commissioner, including those portions of it which are legally incompetent. Hereafter, when a commissioner takes proof, he will not, in general, without the special direction of

the Court, receive testimony, which appears to him clearly inadmissible.

Under the revenue collection laws now in force, ad valorem duties are assessed on the *market value* of goods *purchased* for exportation, and not, as formerly, upon their *actual cost.* But their actual cost must always be more or less important, and must sometimes be the principal, if not sole, criterion of their value. Nothing in the existing system exempts an importer from the former penal consequences of invoicing them below their actual cost with a design to evade the payment of any part of the duties. The decision reported in 17 Howard, 91, shows that the previous legislation and authorities on the subject are applicable under the laws now in force.

Of the facts alleged in the application of the petitioner, he has failed to prove some, of which the materiality might have been so questionable as to induce me to doubt whether they ought, if proved, to have been reported. He does not deny the deduction, in the invoice in question, of a discount which was not actually deducted at the place of exportation. He does not deny his own knowledge that this discount was fictitious, but alleges as an excuse that a commission, which he says that he did not pay, was, under a treasury regulation, added to the alleged cost of the goods as stated in the invoice.

This, if it had been proved, and if the discount and commissions had been of equal amount, would have been immaterial. The commission, when omitted by an importer, is added at the Custom House, because, whether it has been paid by him or not, it enters into the fair market value. The fictitious discount was a deduction of an absolute part of the actual *cost.*

The phraseology of the importer's oath shows conclusively the insufficiency of the alleged excuse.

The only material inquiry is, whether the goods of the importation in question were, to this importer's knowledge invoiced below their actual cost at the port of exportation. If he knew them to be thus under invoiced, his intention to evade the payment of a proportional part of the duty is, I think,

legally deducible. I also think that his admission of the forfeiture includes an admission of the fraudulent intent without which it would not have been incurred.

I report the facts to be that the goods in question, when entered by the petitioner, were to his knowledge invoiced below their actual cost at the port of exportation to the extent of the discount of five per cent., and that they were thus invoiced below their actual cost to evade the payment of a corresponding part of the duties thereupon. I cause this my statement of facts to be annexed to the applicant's petition, and direct that the same and the subjoined evidence taken as aforesaid be transmitted to the Secretary of the Treasury.

DISTRICT COURT. August 17, 1860.

ADMIRALTY.

WOOLSTON *v.* THE JOHN A. WARNER.

1. In the case of a mere aquatic excursion of pleasure for a trip which is to end at the port of departure, a simple breach of contract between passengers and a navigator for their transportation, is not cognizable by a court of admiralty under the Constitution, where process in *rem* is asked for.

2. The libel should show that the voyage is one which brings the contract within the jurisdiction.

CAUSE OF CONTRACT.

LIBEL to recover damages for breach of contract to carry passengers from Philadelphia to Cape May, thence to the ship Great Eastern and thence back to Philadelphia.

CADWALADER, J.

The libel does not so state the purpose of the voyage in question, or the destination of the steamer, as to indicate whether the contract for the transportation of the libellant as a passenger, was, in respect of the alleged breach, within the admiralty and maritime jurisdiction of the Court.

That there might, in the course of the voyage, have been occurrences in respect of which the jurisdiction would have

been exercisable, does not affect the question whether the contract itself, or the alleged breach of it is a subject of the jurisdiction.

In general a contract for the transportation of a passenger from a port of any State to any port beyond the territorial waters of that State is a proper subject of this jurisdiction. In the present case the specific difficulty arises not from the character of the contract in this respect, but from the character of the voyage.

The libel should show that the voyage is one which brings the contract within the jurisdiction.

For aught that appears on the face of this libel this voyage might have been a mere excursion of pleasure, the passengers returning at the end of the trip to the port of departure without having reached a place of destination for any purpose of residence, or temporary sojourn, or further travel by land or by water, or for any purpose of commerce, or purpose of navigation directly or incidentally, or potentially connected with any commercial interest cognizable in a maritime court. The jurisdiction if exercisable in such a case, would likewise be exercisable in every case of an aquatic excursion of pleasure from Philadelphia, if the yacht or other vessel should touch or cast anchor on the shore of New Jersey, or should cross the circular boundary of the State of Delaware. If the jurisdiction were exercisable the Court must necessarily entertain inquiries concerning the sufficiency of her outfit and equipments, the description and quality of her supplies, and the fulfilment or non-fulfilment, or tardiness or punctuality of the fulfilment, of express or implied engagements as to the times of departure and arrival, etc. In some countries, the marine or admiralty courts, in other countries the courts called commercial, are, to some extent municipal, as well as cosmopolitan tribunals. Their jurisdiction under some governments is exercisable I believe in cases like the present. But some of these courts have also cognizance of suits upon policies of insurance, and bills of exchange, and other matters which are not proper subjects

of maritime jurisdiction. The jurisdiction of the admiralty and maritime tribunals of the United States under the Constitution is restricted to cases in which interests of navigation with foreign countries or between States of the Union are, or may be, concerned. I, therefore, am of opinion that in the case of a mere ordinary aquatic excursion of pleasure for a trip which is to end at the port of departure, a simple breach of a contract of passengers with a navigator for their transportation is not cognizable by this Court.

The libellants' proctor and advocate has not been willing to ask process in personam, unless process in rem can also be awarded. Otherwise the former process would perhaps have been awarded, leaving the question of jurisdiction for future consideration. As the prayer for the arrest of the vessel has been insisted upon, I have, however, thought it proper to decide the question of jurisdiction in this preliminary stage of the proceeding.

I cannot award the process in rem. But, that my decision may be appealed from, the libel may be filed, and also this opinion, with an entry by the clerk, that, for the reasons therein stated, the process prayed is refused by the Court.

The decision in this case was reversed, on appeal, by the Circuit Court: Judge Grier holding that the object of the voyage in a maritime contract to carry passengers, whether for trade or pleasure, was immaterial, as was also the fact that its terminus was the point of departure. He cited Minturn *v.* King, 16 How. 469.

DISTRICT COURT. AUGUST 24, 1860.

ADMIRALTY.

DABNEY *v.* THE MARY HOLLAND.

A vessel in a voyage from Glasgow to Philadelphia, having sustained serious injury from storms, put into the port of Fayal where money for repairs was raised on bottomry on the vessel and cargo. She was after-

wards sold at public sale on a lien for seamen's wages. Her cargo was also judicially sold. *Held:*

1. That the owners of the cargo as between themselves and the owner of the vessel in paying their respective portions were paying money which he should have paid, they being sureties for his debts, but that their relations did not affect the rights of the bottomry creditor.

2. That as among the respective owners of the cargo—the ship being a general ship—their contributory proportions of the amount to be paid should be the ratios, not of the proceeds of the judicial sales, but of the respective market values in Philadelphia ten days after the vessel's arrival; although the case being one of deficiency, the amounts payable in distribution must be determined by the results of the judicial sales.

LIBEL to enforce bottomry bond against vessel and cargo.

The following opinion was read and ordered to be filed upon consideration of the report of the clerk made under order of the court in aid of distribution of the fund in court. The facts will fully appear therein.

CADWALADER, J.

The brigantine Mary Holland in a voyage from Glasgow to Philadelphia, having encountered serious injury from storms, and leaking dangerously, put into Fayal where she was properly repaired and refitted. The sum of the contributory amounts of general average upon her cargo appears to have constituted a large proportion of the whole expenditure incurred.

The entire sum expended was raised at Fayal upon a bottomry bond of the vessel and cargo for the amount, including the marine interest of $9,688.25 payable ten days after arrival at Philadelphia, equal in our currency to $8,073.96, which became due on 3d April, 1860. To enforce this bond against the vessel and cargo this libel was filed on the 5th of the same month. The vessel was a general ship. The respective owners or consignees of the cargo had received no statement of particular or general average, or of contributory interests. The case was, with their consent, heard summarily. After the addition of satisfactory proofs of the causes of the bottomry loan, and of the expenditures included in it, they made no per-

sistent contestation of the libellant's demand. Under such circumstances, I do not think him entitled to costs to an amount exceeding $175, which appears to have been about the sum of such charges as would have been incurred here if the case had been settled upon a dispacheur's adjustment without litigation. But the vessel has been sold for $2,600 pending the suit, under a decree in another proceeding for wages of the crew. The wages, and such additional specific charges, other than court costs, as were liens on the vessel or should be deducted from the proceeds of the sale of her, or from the freight, have been paid, or are to be paid from the proceeds of the sale under that decree in the registry of the court.

These deductions appear by the clerk's report to be $1,244.36, leaving as net proceeds of the vessel $1,355.64, which, and the amount of the freight, $1,581.73, together $2,937.37, are applicable in the first instance to the payment of the libellant's demand. His demand with interest from 3d April last will by these credits have been reduced to $5,298.06. The whole of the cargo has also been judicially sold and the proceeds paid into the registry. The net proceeds of the several items composing it have been ascertained according to the clerk's report by deducting the respective amounts of duties, freight, and other specific charges not, in their character, costs of suit, which were properly liens on the same, or on their proceeds. After these deductions, the net proceeds of the cargo, under six heads of ownership, were, according to the clerk's report, in the aggregate, $5,079.87. It appears by the same report that the aggregate amount of general average on the cargo including the addition of maritime interest was $3,201.25, which, being deducted from the net proceeds of the cargo, and credited on account of the above balance of the libellant's demand, leaves a fund of $1,878.62 towards the payment of the reduced balance of $2,096.81.

So far as the six amounts composing the $1,878.62 are to be applied towards the payment of this balance, the owners of the cargo will pay money which, as between them and the owner of the vessel, the latter partly should have paid.

They are, as between him and them, to this amount, if not in any greater amount, sureties for his debt. His default in not exonerating them from this liability does not, however, affect the right of the bottomry creditor. As among the respective owners of the cargo their contributory proportions of this amount should be the ratios not of the proceeds of the judicial sales, but of the respective market values in Philadelphia ten days after the vessel's arrival. But, though the *proportions* are to be thus ascertained, the *amounts* payable in the case which has occurred, of a deficiency, are to be determined by the results of the judicial sales, whatever may have been the attendant sacrifice, or however unequal or disproportional such sacrifice may have been as to different portions of the cargo. To the general truth of this remark, an exception might have been admitted, if the sacrifice upon any one of the items composing the cargo had been consequent upon its deterioration from internal decay since it was taken into legal custody; as to one of the items, there was, in this respect, some apparent doubt. But, the doubt is resolved by the clerk's report, from which it appears that the deficiency in the proceeds is the result of the sacrifice of which there is always more or less unavoidable hazard in a judicial sale.

The foregoing remarks, and the clerk's report will perhaps facilitate the adjustment of claims of owners of the cargo whose funds have been absorbed in the payment of the bottomry debt upon the owners of the vessel or underwriters on her, and possibly the adjustment of claims of owners of the cargo, or their underwriters respectively, among themselves. But, the value at which the vessel should, for the purposes of such adjustments, be estimated elsewhere than in this court under whose process she has been sold, would perhaps depend upon views which cannot properly be considered here.

The decree will be that the several amounts reported by the clerk as deductions from the gross proceeds of the sales of the vessel and several items respectively composing the cargo, where not already paid, shall be paid out of the proper funds in the registry of the court, after which the costs remaining un-

paid, (not including any costs of the several claimants) are to be paid out of the said funds, which costs the clerk will ascertain, and that the whole remaining proceeds of the sales of the vessel and several items composing the cargo be paid to the libellant.

CIRCUIT COURT. NOVEMBER 2, 1860.

EQUITY.

LAURA KEENE *v.* WHEATLEY & CLARKE.

A party asserting her literary proprietorship of an unprinted comedy, under an assignment to her by its author, complained of its theatrical representation by the defendants, without her consent. It had been composed in England for performance at a London theatre. Difficulties of adaptation preventing its performance there, it was thrown back on the hands of the author. He, subsequently, not being a citizen, or a resident of the United States, for a valuable consideration, transferred his proprietorship of it for the United States to the complainant, a resident of New York, where she was the proprietor and manager of a theatre. She adopted measures for securing a copyright; and, in so doing, performed all such acts prescribed by statutes of the United States as were performable without a publication in print. The play, under her management, was adapted to representation at her theatre, with the assistance of an actor of her company, to whom the principal character was allotted; and, in the course of this adaptation, received written additions, underwent curtailment, and was otherwise altered. The additions were made or suggested by this actor. The play, as composed in England, or as thus altered, was never printed. As altered and adapted, it was publicly represented at the complainant's theatre. Here, the same actor, in performing the principal character, introduced, with a view to stage effect, some unwritten additions, relying for the repetition of them, upon his memory alone. The representation at the complainant's theatre having been successful, the defendants, proprietors, and managers of a theatre at Philadelphia, afterwards performed the play, against her will, at their theatre, imitating closely the general and particular performance of it, as it had been represented by her. They had witnessed its performance at her theatre; but this, whatever assistance it may have afforded them, was not the means of enabling them to represent it themselves. They obtained the contents of the English manuscript from a former copy, which had been unauthorizedly retained, or made, by a player at the London theatre for which it had been composed. The additions, written and unwritten, were, without the permission of the complainant, communicated to them by the same actor who had, under her management, introduced them at her theatre. It was *Held:*

1. That as the author was a non-resident alien, the complainant, though herself a resident of the United States, could not, as proprietor of the play,

sustain her suit upon the statutes of the United States for the protection of authors and their assigns.

2. But, independently of this legislation, the court, having, through the citizenship of the parties, a general equitable jurisdiction in the case, the suit was sustained.

3. The foreign author's assignment, if to be deemed a partial one, was, *at law*, inoperative, except as a license; but, having been for a valuable consideration, was, *in equity*, valid, as an assignment, for the United States, of such literary property as could exist in his composition.

4. The play never having been published in print, the complainant, as its literary proprietor, could have sustained her suit if she had not herself represented it theatrically before an indiscriminate audience.

5. A publication, literary or dramatic, may be limited or general. It is general, whenever the communication effecting it is not restricted, both as to the persons to whom, and the purpose for which, it is made. When general, it is a dedication to the public for such unlimited uses, including all modes of publishing and republishing, as it may be the means of directly or secondarily enabling any person to make. The complainant's prior performance of the play at her own theatre was a general publication. Therefore, if it had been the means of directly or secondarily enabling the defendants to represent it through a retention of its words in their own memory, or in that of others of her audience, her literary proprietorship could not have been so asserted as to enable her to maintain her suit.

6. But the literary proprietorship of an author and his assigns continues after a general publication, except so far as it may be the means of enabling others to make ulterior publication, or otherwise to use the composition published. Therefore, as the complainant's prior public performance of the play was not the means through which the defendants were enabled to represent it, her suit was maintainable on the foundation of literary property, notwithstanding such prior performance.

7. The written additions to the former manuscript were not independent literary productions, but *accessions* whose proprietorship was incidental to that of the principal composition.

8. Had this been otherwise, their literary proprietorship would have been in the complainant, and not in the actor who conceived and suggested them when he was in her service assisting her in adapting the drama to its intended first performance. His relation to her, as his employer, precluded him from acquiring, under such circumstances, an independent interest of his own in such products of his mental exertion in her service.

9. His *unwritten* additions were not capable of being the subjects of literary proprietorship in anybody. But, independently of any question of proprietary right, the complainant, having the advantage of her priority in the performance of this play, and being engaged in a professional competition in which the retention of this advantage would have been profitable to her, his communication to her professional rivals and competitors of the written, as well as unwritten, additions, was a breach of confidence on his part, from which a Court of Equity would not permit the defendants to derive an advantage to her prejudice, or to retain an advantage thus derived.

10. The additions, written and unwritten, and the incidental curtailments and alterations, having been the means by which the play, as a whole, was adapted successfully to dramatic representation, this equitable doctrine was, independently of any question of literary proprietorship, applicable to the whole play as acted by the complainant, and imitated by the defendants, including the former composition to which the additions were adapted, so far as it was retained.

11. In equity, an amendment of the bill, when allowed after answer and replication, does not open the pleadings unrestrictedly. The Court looks back through them in order to ascertain to what extent, if any, the amendment may have introduced a new case, or new matter; and, in general, considers them as open to this extent, but no farther.

12. An amendment of the bill, after answer, does not sanction the introduction on the part of the defendant, by way of plea, of an allegation of a personal disability in the complainant as having existed at the commencement of the suit. The answer itself would overrule such a plea.

STATEMENT.

THIS was a suit in EQUITY for alleged infringement of copyright in a play. The bill appears, however, to have been framed with a view, also, to meet the broader question of what constitutes literary property at common law. The ground of the contestation and the facts as disclosed by the testimony are fully stated in the opinion. It is only necessary to add, preliminarily, for the more immediate understanding of the case, that the complainant's claim of ownership in the play rested upon an agreement to purchase, for valuable consideration, from Taylor, the author, made 29th September, 1858, carried into effect by an assignment executed by the attorney in fact of Taylor, dated 6th November, 1858. The defendants claimed that, at the time of the purchase from Taylor, he had no title, having previously sold the play to Webster, who sold it to Silsbee, whose widow, after his death, became possessed of it as part of his personal estate, and who sold it to defendants.

At the time of filing the bill the play was in successful representation at the respective theatres of complainant and defendants. The prayer was to restrain the representation by defendants; for an account and payment of the proceeds of the performances, and for surrender of all parts, copies, or transcripts of the composition.

John T. Montgomery, for complainant.
Constant Guillou, for defendants.

CADWALADER, J.

The comedy called "Our American Cousin" is described by the defendants, in their answer, as a "piece presenting, in suitable situations, those eccentricities usually attributed on the stage to Yankees." It was never printed, and has never been published otherwise than through dramatic representation. It was composed in England, in 1852, by a dramatic author named Taylor, for performance in London at the Adelphi Theatre, of which Benjamin Webster was the manager. Mr. Taylor in that year sold it, or the right of performing it, to Mr. Webster. Insuperable difficulties of adaptation preventing its performance there, it was thrown back on Mr. Taylor's hands. In 1855 it again became his absolute property, under an arrangement by which another drama of his composition was exchanged by him, for it, with Webster. The manuscript was then returned to him by Webster. As then written, it was in two acts. Mr. Taylor afterwards changed its arrangement by dividing it into three acts, and also made some trivial changes in the text. The manuscript was then fairly rewritten by his wife. In the autumn of 1858, he, for a valuable consideration, transferred all his literary and dramatic proprietary rights in it, for the United States, to the complainant, who is the lessee and proprietor of a theatre at New York. At the close of September, 1858, she received from his agent at New York the manuscript, in Mrs. Taylor's handwriting. In the adaptation of the piece for its intended performance at the complainant's theatre, she was assisted by Joseph Jefferson, an actor of her company, whom the defendants describe in their answer as a comedian of tact and talent. The principal part in the play, called the Yankee character, was allotted to him. The manuscript underwent curtailment and alteration, and received additions. More than three-fifths of the dialogue in one scene, and the fourth of another, were struck out, besides the erasure of many passages in other scenes. The addi-

tions were chiefly in the character allotted to Mr. Jefferson. Those in this character, if not in the others, were made or suggested by himself. The curtailments and alterations, and some of the additions, were made with a lead pencil on the manuscript, which had been received by the complainant from the author. This manuscript having been written with ink, the author's composition, in the precise form in which he transferred it, is distinctly preserved. The manuscript was exhibited to him when he was examined in this cause, under a commission to London. He then deposed that these alterations, made since he parted with it, were in a handwriting unknown to him. After the return of the commission, the manuscript thus altered was proved, by a witness examined at New York, to be the one from which the piece was played at the complainant's theatre. Thus, in the text in ink we have the English composition, and in the writing in pencil we have some of the adaptations made under the complainant's management. The text in ink having been written on one side only of the paper, many of the pencil additions are on the former blank sides. They are, in other instances, written over pencil erasures, or interlined. The former text is nowhere obliterated or illegible. The manuscript contains references to other additions, as having been introduced at New York. These must have been written on other sheets, which have not been produced in evidence.

The play, when thus altered and adapted, was acted at the complainant's theatre, on the 18th of October, 1858. This was its first representation on any stage. The success of it was complete. Its performance was constantly repeated, with continued success, for many months.

The defendants are lessees and managers of a theatre in Philadelphia. They knew, between the 10th and the 17th of November, 1858, if not earlier, that the complainant asserted, under Mr. Taylor, as the author of this play, an exclusive literary proprietorship and sole right of dramatic representation of it in the United States. They were informed that she was willing, for a price named by her agent, to sell to them the right

of acting it in Philadelphia. One of them replied that they already had it, and intended to play it in Philadelphia. The manner in which they procured it has been since disclosed.

Joshua Silsbee, an American actor, was, in 1852, a performer in Mr. Webster's theatrical company at the Adelphi Theatre in London. In 1852, Mr. Taylor, the author, was told by Silsbee that he had a copy of the manuscript in his possession, for the purpose of studying the Yankee character. Mr. Webster, then the proprietor of the play, deposed that he never gave to Silsbee a copy, or permission to have one; and that, if he had one, he must have obtained it surreptitiously. The defendants allege, in their answer, that the parts in the play were cast in England, when this character was allotted to Silsbee, whom they describe as capable of imparting to its those *peculiar features and touches* upon which the success of the play would, in a great measure, depend. They also allege that the piece was rehearsed at the Adelphi Theatre in 1852, preparatorily to its intended performance there. These allegations appear to have been founded altogether in error. The evidence is very distinct that it never was rehearsed in England. There is no evidence that anything was done with a view to its intended rehearsal, or that the characters were, in whole or in part, even provisionally cast. They cannot, consistently with the evidence, have been *definitively* cast with Mr. Webster's concurrence. They possibly may have been provisionally, or conjecturally, cast by somebody, perhaps by Mr. Silsbee, who, as a performer at that theatre, expected to act the Yankee character, if the play should be represented there. But, according to Webster's testimony, strengthened by that of Taylor, no part in the piece was ever allotted to Silsbee, or to any other actor in Webster's company. Mr. Webster, as manager, was very strongly of opinion that Mr. Silsbee was incapable of performing the Yankee part with success. He had frequently failed at that theatre in such parts. In this unfavorable opinion, Mr. Taylor, the author, decidedly concurred. On this point, if the testimony had been impeached, it would have been confirmed by two letters of the year 1852, from Taylor to

Webster, concerning the difficulties of adapting this character to the capacity of Mr. Silsbee, or of any other performer at the Adelphi Theatre. This appears to have been a chief cause of its non-performance there. A copy of the manuscript must, however, have been in Mr. Silsbee's possession, and have been retained by him. His possession of it, if ever known by Webster, must have been overlooked, and afterwards forgotten. Silsbee returned to the United States, bringing it with him, and subsequently, in 1855, when still in possession of it, died in California. It passed, after his death, into the possession of his widow, who subsequently became the wife of William Chapman. Mrs. Chapman has not been examined by the defendants as a witness, though the principal allegations of their answer must, if true, have depended upon information which cannot, probably, have been derived from any other person. Of the truth of these principal allegations, they cannot have had any direct knowledge of their own. There is no evidence that Mrs. Chapman's attention, or that of any one else in the United States, was attracted to the copy of the manuscript in her possession, until after the public announcement, at New York, of the intended performance of the play at the complainant's theatre. There is no reason to believe that the existence of this copy was known to the defendants until after this announcement, or, indeed, until after the successful representation of the piece at her theatre. All that we really know concerning the copy is, that it passed, at about this time, into the possession of the defendants from that of Mrs. Chapman, and that Mr. Silsbee, her former husband, had obtained possession of it when he was a player in Webster's company. The defendants now claim, as will be stated hereafter, a right of using this copy under a title which, they assert, was vested in Silsbee. As they assert this claim, his own statement, that he had possession of it for the purpose of studying a part in it, is evidence against them of the purpose for which he obtained the possession. The statement might have been true, though the parts were not cast, nor any definitive allotment of this part made. The inference from the testimony least unfavorable to his

memory is, that he may have thus obtained the copy in the first instance, and that his retention of it was afterwards overlooked, or disregarded. We cannot, upon the testimony, believe, or assume, that he retained the possession of it with any direct permission from Webster. But such permission, had it been obtained, would not have authorized Silsbee, if living, to make any public use of the copy, or to sanction any such use by others. Of course, no party coming, after his death, into possession of it under him, could give a legal sanction to any such use of it by the defendants.

After they had obtained this copy from Mrs. Chapman, the defendant Clarke procured from Mr. Jefferson the additions which he had, under the complainant's management, introduced into his performance of the principal character. Whether Mr. Jefferson, besides the written additions to it which have been mentioned, introduced others which have never been written, relying, for the repetition of them, on his memory alone, is involved in some uncertainty. But if his additions were both written and unwritten, they were all, according to the proofs, communicated by him to the defendants and introduced by them into their performance of the play. One of the complainant's interrogatories required the defendants to state fully what language or words Mr. Clarke thus obtained from Mr. Jefferson. Instead of making the statement thus required, they merely offered in their answer to state "all and singular the language or words" communicated if they should afterwards be required so to do. This offer does not entitle them to derive any benefit from their omission to make the disclosure. But, the complainant, not having excepted to the answer, cannot use their omission to supply any defect in her own proof. Their offer to make the statement shows, indeed, that nothing communicated by Mr. Jefferson was thought so unimportant as to have been lost by them for want of a memorial. That what he communicated to them included any additions which had not been previously written for the complainant is improbable. But it may nevertheless be true. If it be so, the written and unwritten additions must

have been combined in the production of dramatic effect. If the defendants can, in any view of the case, derive any benefit from an assumption that some of them were unwritten, the assumption should be made unless an inquiry by a master to ascertain the precise truth be directed. Such an inquiry will be dispensed with by assuming that some of the additions were unwritten. This assumption will, however, be made so far only as it may benefit the defendants. We will hereafter see that the decisions will, upon this view of the facts, be the same as if the additions were all written. But under one head the reasoning will not be the same.

The defendants, by thus obtaining the manuscript from Mrs. Chapman, and the additions from Mr. Jefferson, having enabled themselves to represent the play as it had been adapted and brought out by the complainant, announced its intended performance on the 22d and 23d of November, 1858, in a playbill headed: "First nights of the great new Comedy by Tom Taylor, author of 'Still Waters Run Deep,' etc., entitled *Our American Cousin,* now in the sixth week of its brilliant and triumphant career in New York. It will be presented after *several weeks of most careful preparation.*" It was performed according to this announcement, each of the defendants acting a part in it, the defendant Clarke performing the Yankee character with Jefferson's adaptations. The defendants performed the piece repeatedly afterwards, with profitable results.

Before their first performance of it, each of them, and the actress of their company who performed the principal female character, had witnessed the performance at the complainant's theatre. But they were not enabled to represent it at their own theatre through any impression of the words on their memory, or on that of any of the audience who had attended the complainant's performances. The proof is, on the contrary, distinct, that the words were obtained by them from the manuscript procured from Mrs. Chapman, and through the communication, by Mr. Jefferson, of the additions.

The above quotation from the defendant's playbill indi-

cated that their purpose was not an independent representation of the play so much as a repetition of its performance at New York. Their effort was to imitate this performance as closely as possible. That they succeeded in producing a very close imitation appears from the testimony. A person engaged at the complainant's theatre, in her constant employment, who had very often seen the play performed there, and says that he was familiar with it, was present at the defendant's theatre on the first night of its performance in Philadelphia. Their playbill, already mentioned, containing a synopsis of the scenery and incidents, under more than one hundred heads, was before him. He deposes that he knew the play, word for word, as the performance went on. According to his testimony, the particular scene already mentioned, of which more than three-fifths had been expunged by the complainant, was wholly omitted by the defendants in their performance; but, except in this omission, the performances at each theatre were the same, or similar. Two particular instances, confirmatory of this evidence, may be regarded as characteristic of the imitative purpose of the whole performance. We have seen that, long after Mr. Silsbee left England, the arrangement of the play was changed by dividing it into three acts. The manuscript which he took away must have been that of a play in two acts. The defendants' playbill shows that they adopted the change of arrangement by making the division into three acts; and their cross-interrogatories for the commission to London indicate their vigilance in observing this, and a minuter nonconformity in the texts of the manuscripts. The other instance was in one of the adaptations at New York. The words "Pontiac, Michigan," had been there struck out from the English manuscript, and "Brattleboro', Vermont," substituted with a pencil. Where this first occurs in the complainant's manuscript, the defendants' playbill, in describing the scene, contains the words "Brattleboro', Vermont."

Thus, at each theatre, the play, as acted, was the English author's composition adapted by the complainant, with Jef-

ferson's additions, and some curtailments and alterations, to the stage in the United States. The defendants appear to have been careful to secure to themselves, before performing it, the means of acting it, as a whole, comformably to the method of its previous representation by the complainant.

She instituted the present proceeding in November, 1858, alleging an exclusive right in herself under the above derivation of title, and the statutes of the United States for the protection of general and dramatic literary property, and praying an injunction to restrain the defendants from representing the play, and an account of the profits, etc. When the piece was in the course of successful performance at both theatres, an application for a preliminary injunction was heard upon affidavits and counter affidavits. Upon a deposit by the defendants of a sum of money equal to the amount for which the complainant had been willing to license its performance by them, with a sufficient addition to cover costs, the court refused to grant an injunction in the primary stage of the cause.

It was afterwards heard upon bill, answer, and replication, depositions and papers read, and admissions.

The defendants, notwithstanding the public declaration in their playbill that Mr. Taylor was the author of the comedy, asserted in their answer that it was of the joint authorship of himself and Mr. Silsbee. Admitting that Mr. Taylor's right and interest were transferred by him to Mr. Webster in 1852, they alleged that Webster, afterwards, for a valuable consideration, assigned it absolutely to Silsbee, who bequeathed his personal estate, in which it was included, to his widow, now Mrs. Chapman. They asserted that her present husband, for a valuable consideration paid by them to her, licensed its performance by them, and delivered to them the manuscript, which they say was the original one. They have adduced no evidence of the alleged bequest, or subsequent license, or of the payment of the alleged consideration. The assertion of Webster's transfer to Silsbee is not only unsupported by proof, but is directly contradicted by the

testimony. The depositions of Mr. Taylor and Mr. Webster, moreover, entirely negative Silsbee's alleged participation in the authorship; and show that the play was composed exclusively by Taylor, in whom, as we have seen, the proprietorship of it was revested in 1855.

One of the interrogatories of the complainant's bill required the defendants to state fully, when, where, and how, they had obtained possession of this comedy, and how they claimed the right of representing it. Any technical operation in their favor of their own allegations responsive to this and other interrogatories of the bill is removed by the contradictory testimony which has been reviewed. Their answer, which has rendered this review necessary, is of no technical force against such evidence; and not having been founded, as to the most material points, upon any possible knowledge of their own, is of no moral opposing force.

If Mrs. Chapman was the duly qualified representative of Mr. Silsbee's estate, and, with her present husband, licensed the performance of the play by the defendants, the license was of no effect whatever. Of this the defendants would seem to have been, at the time of the hearing, fully aware. They did not attempt to verify any writing as a manuscript, or copy of the manuscript, of the play, or offer any such writing in evidence. They thus wholly failed in their endeavor to show that they had rightfully represented the play from the manuscript, or that any copy of it had ever been rightfully in their possession.

The defence was confined, at the hearing, to a denial of the complainant's right of maintaining her suit under the acts of Congress for the protection of literary property, or independently of those acts.

The consideration of the acts of Congress may be prefaced by the remark that the word *copyright*, and phrase *literary property*, though sometimes confounded, are not synonymous. The latter phrase has a more general signification than *copyright*, which signifies an exclusive right of an author

and his assigns to *print* his literary composition, and publish and republish it in print. A legislative enactment securing generally to literary proprietors a copyright for a limited period, but containing no special provision as to theatrical representation, does not, in the case of a dramatic literary composition, include the sole right of such representation. This, which the course of legislation on both sides of the Atlantic implies, was decided in Coleman *v.* Wathen, (5 D. & E. 245,) and Murray *v.* Elliston, (5 Barnw. & Ald. 657,) cited and remarked upon in 12 Ad. & El., N. S. 236, and 2 De G. & Sm. 675, 692. In the absence of any legislation for the special protection of dramatic literary property, an authorized public circulation of a printed copy of a drama for which there is a legislative copyright is a publication which legalizes an optional subsequent theatrical representation by anybody from such copy. But the mere adoption of the measures by which such a copyright may be secured has no such effect unless their adoption has been attended or followed by an actual publication in print.

The complainant had adopted the usual measures to secure to herself a statutory copyright for the United States. In so doing, she had observed all the statutory regulations on the subject, except the direction that a copy of the book be delivered to the clerk of the proper court within three months from the time of its publication. The intended meaning of the word *publication,* in this and other statutory provisions concerning copyright, is publication *in print.* The period, therefore, from which the three months would be computable, is not arrived. The complainant had thus observed every direction which could be complied with in the case of an unprinted book.

So far as any question under the acts of Congress was concerned, the *citizenship* of the *parties in the cause* was immaterial. The act of 15th of February, 1819, gives to the Circuit Courts original cognizance, as well in equity as at law, of all cases "arising under any law of the United States, granting or confirming to authors or inventors the exclusive

right to their respective writings, inventions, and discoveries." This act concerns remedies, and not rights. Under the statutes which confer and regulate *rights* of literary proprietorship, the citizenship of the *parties litigant* was also unimportant. It sufficed, under these acts, that the complainant was a *resident* of the United States, which was undisputed. The difficulty in her way was that Mr. Taylor, the *author* through whom her title was derived, was a *non-resident alien.* This difficulty presented the only question under the acts of Congress requiring particular consideration.

The act of 3d of February, 1831, repealed, with a saving of privileges then existing, the prior statutes concerning rights of literary property. The 9th section of this act, giving redress for the unauthorized *printing* or *publishing* of *manuscripts,* operates in favor of a resident of the United States, who has acquired the proprietorship of an *unprinted* literary composition from a non-resident alien author. But the word *publish* here again means publish *in print.* This—which is the only section enabling a proprietor, who derives his title from such an author, to assert any right under the act—gives no redress for an unauthorized theatrical representation. The other sections concern copyright. They apply only to authors who, if not citizens, must be residents of the United States, and proprietors under derivations of title from *such* authors. No other proprietor can obtain a copyright under the act.

The only statute which affords redress for unauthorized theatrical representations is the act of 18th of August, 1856. This act applies only to cases in which copyright is effectually secured under the act of 1831.

Therefore, the complainant had no statutory right of redress.

The remaining inquiry was, whether her suit could be sustained, independently of any legislation concerning dramatic or other literary property.

Under this head, as the defendants were citizens of Penn-

sylvania, the general equitable jurisdiction of the court could be exercised if the complainant was a citizen of another state, or an alien.

At the commencement of the suit she was an alien, residing at New York. But she had previously filed a declaration of her intention to become a citizen of the United States. During the pendency of the suit, and before the hearing, she was naturalized. She was described, in her bill of complaint, as a citizen of the State of New York. This description of her, though correct at the time of the hearing, had not been correct when the bill was filed. She should have been described in it as an alien. As the jurisdiction of the court was maintainable under either description of her, if true, the mistake was of such a character that an amendment correcting the misdescription would, of course, have been allowed, whenever asked. The case was heard and considered as if such an amendment had already been made.

The complainant insisted that, as the play had never been printed, her literary proprietorship of it entitled her to maintain the suit, independently of any statute.

The author's proprietary rights for England and Scotland had never been transferred to her. The statutes of the United States for the protection of authors do not, like those for the benefit of inventors, expressly sanction transfers of limited local proprietorships of exclusive privileges. A writing, which is, in form, a transfer by an author of his exclusive right for a designated portion of the United States, would, therefore, *at law,* even under the statutes of copyright, operate as a mere *license,* and would be ineffectual as an assignment. (10 How. 194; 1 Wall, Jr., 339; 17 Com. B. 436, 437.) Whether an assignment by a *foreign author* of his whole right, for the entire United States, would fall within the same rule, is a question which might be discussed, if such an author could acquire a copyright, or by transfer, impart the privilege of acquiring one. (See 4 H. L. Ca. 992, 993, 940.) In the present case, where the foreign author had no statutory pro-

prietorship, and could impart no privilege of obtaining one, his transfer to the complainant cannot be regarded otherwise than as only a partial assignment, upon which a suit could not be maintained at law in her own name. But, in a proceeding like the present, in equity, a limited local, or other partial assignment, if made, for a valuable consideration, by a person whose transfer of the whole interest would have passed the proprietorship, is carried into effect, whether it would have been effectual or not, at law. (3 Jur. 219; 11 Sim. 572; 5 Peters, 602; 3 Swanst. 393; 4 Mylne & Cr. 702, 703; 7 Sim. 109.) The complainant, therefore, does not, in this court, stand in any respect on a less favored footing than an *author*. That her asserted literary proprietorship is derived under one who was a non-resident alien does affect her case, considered independently of the statutes.

Here, we may remark, that the literary proprietorship of the principal composition included that of the additions to it which have been described as written, in pencil, on the complainant's manuscript, and of such other additions as may have been made in writing. These additions, as *literary accessions*, were incapable of independent proprietorship. (Hatton *v.* Kean, 29 L. Journ. N. S. Com. Pls. 20; 7 Com. B. N. S. 268; Pothier Propriété, 170 to 175; Code Nap. 566, 567; and see the citations of other modern European Codes in Saint Joseph's Concordance.)

The rules of the law of accession, which have been thus applied, are applicable in favor only of such innocent parties as have not wilfully used the property of others. A wrongdoer can derive no benefit from the otherwise accessorial character of that which he converts to his own use. The publication of books may thus, for literary piracy, be suppressed, when the pirated matter is accessorial only to former compositions for which there could be no copyright, and constitutes only a very small proportion of the whole contents. Thus, as against a wrongdoer, that which is an accessorial part of a whole, may be regarded as a material, or even vital, part. (3 Swanst. 680, 681; 5 Ves. 709, 16 Com. B. 459; 3

Mylne & Co., 738, 736, 737.) The distinction will hereafter be found important.

In whose handwriting the additions were, does not appear, and is not material. That they were conceived and suggested, if not written, by Mr. Jefferson when engaged in assisting the complainant in bringing out the play, is indisputable. If their accessorial character could be excluded from consideration, his relation to her as his employer would have rendered him incapable of acquiring in them an independent proprietorship of his own. The duties of theatrical performers to their employers are, in this respect, like those of artists retained under a standing engagement in any other professional service. Where a female opera singer had engaged with a theatrical proprietor to sing for three months at his theatre, and not sing elsewhere during that period, without his consent, Lord St. Leonards said: "The engagement to perform for three months at one theatre must *necessarily* exclude the right to perform at the same time at another theatre. It was clearly intended that" she "was to exert her vocal abilities to the utmost to aid the theatre to which she engaged to attach herself." He was "of opinion that if she had attempted, even *in the absence of any such negative stipulation,* to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as" in the case of "the contract into which she" had "actually entered." (1 De G., Macn. & G. 618, 619. See 6 De G., M. & G. 230.) A calico printer discharged his head colorman, who sued him in trover for a book of entries of processes of mixing the colors used in his business. The book had been kept by the plaintiff while in the defendant's employment. It contained entries of many processes which were of the plaintiff's own invention. The decision was that he could not recover. Heath, J., said that though there might be inventions of the plaintiff in it, yet they were the property of the master. Chambre, J., said that the master had a right to something beside the mere manual labor of the servant in the mixing of the colors; and though the plaintiff invented them, yet they were to be used for his

master's benefit. (4 Taunt. 770.) If it be suggested that literary addition, or adaptation, is no part of the general duty of dramatic performers, and that there is no particular exception in the case of an unprinted play never before performed, the objection may, in this case, be disposed of without considering the question suggested. Here, Mr. Jefferson, while in the general theatrical employment of the complainant, engaged in the particular office of assisting in the adaptation of this play; and made the additions in question in the course of his willing performance of this duty. She, consequently, became the proprietor of them as products of his intellectual exertion in a particular service in her employment. Where an inventor, in the course of his experimental essays, employs an assistant who suggests, and adapts, a subordinate improvement, it is, in law, an incident, or part, of the employer's main invention. (1 Com. B. 551.) In a case of a musical composition, a person who adapted words to an old air, and procured a friend to compose an accompaniment, acquired a copyright, both in the words and the accompaniment. (7 Com. B. 4.) The direct application of the principle to literary compositions, their parts, additions, and accessions, is too familiar to require more than a reference to some of the authorities. (2 L. Journ. Ch. 90, 2 S. & S. 1; 16 Com. B. 459; 3 Jur. 219; 5 Carr. & P. 58; Merlin Questions de Droit, "Contrefaçon," § II, vol. 2, p. 659; "Propriété Literair," § II, vol. 6, p. 498, 4th ed., and Hatton *v.* Kean, cited above.)

Therefore, so far as the question of literary proprietorship, independently of the statutes, may be concerned, Mr. Jefferson's written additions will require no separate or distinct consideration.

The play having never been printed, the complainant, as its literary proprietor, could, independently of the statutes, have maintained her suit, if the defendants' theatrical representation of it had not been preceded by her own. If the previous performance of it at her theatre had been the means of enabling the defendants fairly to bring it out at their theatre, the suit

could not have been maintained. But the point for decision was, whether her prior performance, as it had not been the means through which they were enabled so to do, defeated her suit.

Under the peculiar circumstances of the case, this point could, as I thought, and still think, be decided independently of any question of literary proprietorship. In the administration of equitable jurisprudence, improper disclosures of the knowledge of primary results of mental development, whether the contents of literary compositions, or oral discourses, or secrets of inventors, or improper disclosures of knowledge acquired in professional relations, or in those of service or agency, are prevented and redressed on principles of general applicability. (3 Law Journ. Ch. 209, 213, 219; 1 Hall & T. 28; 2 De G. & Sm. 652; 1 Hall. & T. 1; 1 Macn. & G. 25; 7 Pet. 317 to 322; 2 Bos. & Pul. 630, 577, 578; 2 Mees & W. 558 to 560; 2 Meriv. 450, 451; 1 Vern. 61; 3 Meriv. 157; 1 Jac. & W. 394; 1 Sim. & Stu. 398; 9 Hare, 241, 267; 21 L. Journ. Ch. N. S. 248; 9 Eng. L. & Eq. 182; 9 Sim. 196; 10 Sim. 135; 15 Sim. 378; 1 Hall & T. 116; 2 Phillips, 777, 778.) In the exercise of this equitable jurisdiction, rights founded in personal and professional relations of *confidence* are protected independently of any question of the existence or continuance of *proprietary right.* Preventive protection under this head is afforded in proceedings against persons not themselves parties or immediate privies to the breach of confidence, A person who has not acquired through it an independent subsisting equity of his own, is not permitted by a court of equity to derive any benefit from it, or retain any benefit so derived.

In the present case, the complainant has acquired all such rights in the principal composition as were formerly Webster's. The defendants' assert in it no right, except as derived under Silsbee. The case, therefore, as to the copy of it which Silsbee had, is the same as if Webster and Silsbee were now the

litigants. The defendants have used this copy, though Silsbee had no possession of it except for use in his professional service to Webster. They procured Mr. Jefferson's additions through his breach of professional duty to the complainant as his employer. As to these additions, the direct breach of confidence was between Jefferson and the complainant. But, according to many of the authorities which had been cited, the defendants, having procured, or availed themselves of, Mr. Jefferson's violation of his duty to the complainant, stand, in respect of it, in his place. We have seen that theatrical performers, in the relation of Silsbee to Webster, or of Jefferson to the complainant, owe to their employers no less fidelity than artists, or agents, retained in any other permanent, or temporary, professional service.

Though the complainant's literary proprietorship of the play in question had not been sustainable, she had the only manuscript from which a first performance of it could be lawfully made. Having the advantage of this priority, she was known to be desirous of retaining the exclusive dramatic representation of the piece. In any competition with professional rivals, this priority, and the possession of the manuscript, gave to her a fair advantage, which, without any literary proprietorship, might have been retained for some time, if not indefinitely. In regulating the police of her theatre, she could have prevented reporters from taking down the words of the play during its performance, and could have excluded persons unwilling to acquiesce in such conditions. (Ambl. 694; 17 Cobb. Parl. Hist. 1094; 2 De G. & Sm. 692; 13 M. & W. 838.) The only fair means by which others could have obtained the words, were, through their impression upon the memory of some person whose constant attendance at her performances of the play might, at length, enable him, elsewhere to repeat or to write out its language. If, through such attendance of one or more persons, the words of unprinted plays could be obtained accurately, the method of obtaining them would not be expeditious or economical. Its adoption has not, in modern experience, been usual. The de-

fendants, as the complainant's professional rivals, did not compete fairly with her when they used any other means of abridging the duration of her legitimate advantages. This remark applies, at all events, to the means which were, in fact, used.

The remark might, under proper pleadings, have been applicable to the use both of the copy which Silsbee had retained, and the additions which the defendants procured from Jefferson. The case would then, upon the merits as disclosed by the answer and proofs, have been a simple one. But, the complainant's bill is not so framed, that she can, independently of the question of literary proprietorship, obtain a decree founded upon the defendant's use of the copy retained by Silsbee. The bill contains no averment of the surreptitious, or other, former, or present, possession by any one of a copy of the manuscript, or of the use by the defendants of such a copy. Except the averment that the defendants represented the play publicly without the complainant's consent, and the interrogatory quoted above, the bill contains nothing on the subject. A decree for a complainant cannot be made upon a fact not averred in the bill, though it may be disclosed in the defendant's answers to the interrogatories of the bill. (3 Swanst. 687, 689; 10 Wheat. 188; 1 Pet. C. C. 383, 384; 1 Gall. 385, 386; 3 Barb. Ch. 51.) The complainant, when this objection was taken, had an opportunity to amend her bill in this particular, but made no application for the purpose. The only advantage to her, therefore, of the disclosures as to the copy retained by Silsbee, and the use made of it, is in the proof which these disclosures afford that the defendants were not enabled to represent the play merely from its having been publicly performed at her theatre. Whether, on the footing of literary proprietorship, this would suffice to sustain her suit, is not at this moment, the question. Independently of such proprietorship, her suit cannot, upon this bill, be sustained on the mere ground of the improper use of this copy.

The complainant is, however, under no such difficulty as to the improper use of the additions procured from Jefferson.

Her bill avers that the defendant Clarke obtained the principal parts and the language from Jefferson, who was in her employment as an actor, and who performed one of the characters in the comedy. Though her claim of an exclusive right had not been sustainable, she was entitled, in her competition with professional rivals, to the co-operation and support of every person employed by her within the walls of her theatre. The implied confidential restriction which ought to have prevented the disclosure of the words of her new play by performers of her own theatrical company, was of the greatest importance to her in this competition. Yet, Mr. Jefferson communicated his additions to Mr. Clarke, who introduced them into his own performance. The unwritten additions, which may have been included, could not be the subject of literary proprietorship. But the equitable jurisdiction which we are now considering is exercisable on grounds which are independent of proprietary right in the party injured, or in any other person. The jurisdiction has been thus exercised in the cases of an oral didactic lecture, and of an unpatentable or unpatented invention. (3 L. Journ. Ch. 209; 9 Hare, 241, 258, 259.) The doctrine in question applies, therefore, alike to the unwritten and written additions, whether those in writing were the subject of literary proprietorship, or not.

If the success of the play is attributable, in any principal degree, to the additions, alterations, and curtailments, by which it was adapted at New York to dramatic representation, the same equitable doctrine applies to it *as a whole*, just as it was acted there, including the former composition so far as retained, and the additions, written and unwritten, if any of them were in truth unwritten. This brings us to the inquiry, how far the additions, as the particular subject of Mr. Jefferson's breach of his duty, should be regarded as having had a principal, as distinguished from a subordinate and insignificant influence, in causing the success of the performance. If they cannot safely be rejected from consideration as trivial and insignificant, both in their *character* and in their *effect*, the cause may be decided on the ground of breach

of confidence, independently of the question of proprietary right.

With reference to this play, the defendants describe such "assistance and authorship" as their answer attributes to the late Mr. Silsbee as "invaluable." Their language, though, so far as the play is concerned, misapplied as to *him*, tends to define the particular character of it as a drama. The language seems to have been less inapplicable to Mr. Jefferson, of whom, as a member of the complainant's company, the talent and experience were, or should have been, at her command. Nevertheless, their answer in certain passages has a tendency to disparage Mr. Jefferson's assistance to them, as though the additions or adaptations obtained through it had been of trivial value. These passages of the answer are, however, inconsistent with other statements in it, and are contradicted by the defendants' own conduct, in procuring and using the adaptations. This conduct precludes them from denying, with any fair show of reason or justice, that for the purpose of adapting the play favorably to the stage, the additions, curtailments, and alterations were improvements at least upon the author's composition. That they probably diminished some difficulties which had prevented the play from being acted in England, and removed objectionable features which, for local reasons, would have prevented the success of it in the United States, is perhaps not stating the case in its full strength. As the play was performed, the success of it, as a whole, was complete. But from what occurred in England and in this country, we may infer that its performance without the adaptations might have resulted in a failure. The author's manuscript had, in England, been cast aside for six years. In all this time, the copy which Mr. Silsbee had retained was unthought of and useless. The defendants having this copy in their possession, with no scruples as to using it, had not been willing to act the play from it, without the New York adaptations. The plot was not theatrically novel. The success of the piece was dependent upon the scenery and incidents, and the viva-

city and humor of the dialogue. Mr. Hallam, following a suggestion of Collier, thinks that, in modern theatres, the use made of scenery has diminished, in certain cases, the necessity for exercising the creative powers of a dramatic author's imagination. Such may be the case peculiarly with a light piece of this class. The synopsis of scenery and incidents in the play-bill shows that this was, in the opinion of those who brought it out, not less important than the dialogue. To these arrangements, however, the dialogue required adaptation. Some of the additions in pencil to the author's manuscript indicate a self-confident, but not imprudent, boldness, which probably was the result of a combination, in Mr. Jefferson, of histrionic talent with a matured experience in the production of comic effect. We, however, cannot estimate their importance or value from anything so surely as from the conduct of the parties and the success of the play. Schlegel asks, "How does a dramatic work become theatrical or fitted for the stage?" and answers, "In single instances it is often very difficult to determine whether a work possesses such a property or not. It is, indeed, frequently the subject of great controversy, especially when the self-love of authors and actors comes into collision. Each shifts the blame of failure on the other." He says of "theatrical fitness," that much must "always depend on the capacities and humors of the audience, and, consequently, on the national character in general, and the particular degree of mental culture." In a certain line of the dramatic profession, a particular actor, or stage manager, or assistant, may be endowed with a peculiar faculty for the adaptation of a piece to such humors and capacities. For a drama like that in question, Jefferson may have possessed this faculty. Whether the defendants could, without his assistance, have been able to bring out the piece at their theatre with any probability of success, is thus an inquiry which cannot be safely prosecuted with a view to an *absolute* answer. That they availed themselves of his aid suffices to convince us that they could not have otherwise brought it out with an *equal prospect* of suc-

cess. Here the question is not so much what number of words he communicated, or what the words were, or what was their *character*, as what *effect* they produced. The purpose of the defendants is, moreover, to be regarded. We have seen that it would not have been attained by a partial or incomplete imitation of the play as it had been successfully brought out by the complainant. Their purpose was to bring out at their theatre a complete imitation of it as a whole. By taking advantage of the breach of confidence committed by Mr. Jefferson, they enabled themselves to effect this purpose. His additions were, therefore, so far as the defendants were concerned, not a secondary, but an essential, part of the play as performed.

But, according to the defendant's answer, these additions were *principally* gags and minutiæ of stage effect, *most* of them old and well known to the dramatic profession, and a very *small proportion* of them original. The language of the answer imports that they were *not wholly* of the character thus described. The defendants' counsel, relying, however, upon the general tendency of its language, has urged that the effect of such adaptations and additions, in promoting the success of the play, must have been insignificant. There is no safe, legal, or equitable standard by which effects of wrongful acts, can, in general, be thus qualified or apportioned for the benefit, or exemption, of parties or privies to their commission. The foregoing reasoning has, in favor of the defendants, already, perhaps, too much relaxed the salutary rigor of the rule which, in general, prevents wrongdoers from succeeding in attempts to apportion, for their own benefit, the unknown consequences of such acts. The result of this case would not be varied if we could safely assume, as, however, we cannot, that the additions consisted principally in mere adaptations of *gags* which, as formerly applied in other plays, were already familiar to persons of experience in the dramatic profession.

A gag, in dramatic language, is a word, a sentence, or a passage of two or more sentences, not in a drama as com-

posed by the author, but interpolated, and uttered on the stage by the player. Gags, in general, are violations of dramatic propriety. But, theatrical regulations which prohibit them are not always enforced with strictness, and are sometimes much relaxed as to comedians in public favor. Sometimes gags are sanctioned by the manager's approval at the rehearsal of a play. They are, occasionally, in comedies of the lighter kind, licensed more or less, if not encouraged, by dramatic authors, who attend rehearsals of their own plays. In England, as the testimony proves, these authors, after the characters have been cast, frequently, before any rehearsal, read their plays, in the manager's presence, to the company of performers. On these occasions, or at rehearsals, gags may be sanctioned by both author and manager. Sheridan, when he was author and manager, probably sanctioned some of the gags with which one of his most popular pieces has, to this day, been usually performed. In the play now in question, where the first scene closes on the characters gathered around the Yankee in England, who asks whether they will have "a cobler, or a julep, a gin-sling, a cock-tail, or a chain lightning?" the author, in his manuscript, adds, "winds up, with a catalogue *ad libitum* of the names and merits of American drinks." To exclude gags fastidiously from other parts of such a play as this would oppose the apparent tendency of the author's own plan of its representation. A strict adherence to his written dialogue would, probably, therefore, in many of the scenes, have been, even in his opinion, less useful than some of Mr. Jefferson's additions. The judicious introduction by a comedian of his "tact and talent" of gags happily adapted for the production or improvement of stage effect, may have prevented the failure, or greatly promoted the success of the play.

The defendants' remark that the gags " were *mostly* old, and well known to the" dramatic "profession," if it had been made with any specified application, and had been verified by proof, would have been of no importance. The judicious introduction of matter whose chief or only novelty consists

in its happy *adaptation* to the production of stage effect, may contribute more to that popularity of a light comedy, which secures profitable repetitions of its performance, than polished wit, refined humor, or classical or courtly sarcasm. Literary *adaptation* is legally recognized as a distinct branch of the dramatic author's profession. It varies in degree from that *aid* which is the mere accessory of another's work to that *production* which constitutes absolute authorship. (17 Com., B. 427; 7 Com., B. N. S. 268; 29 L. Journ., N. S. Com. Pls. 20.) The success or failure of a play may depend upon that which is only accessorial, or upon dramatic adaptation which is not even literary. Modifications of assistance to dramatic effect may be various, almost infinitely so. Most important aid may sometimes be furnished by the repetition, with a new application, of that which has, under other theatrical circumstances, been said or done before. The extent or value of the benefit which may be derivable from such adaptations cannot always be measured very precisely, for practical purposes, by any standard of mere literary criticism.

In the case of a drama which has been printed and published, the subsequent approval of a gag by the manager of the only theatre at which the drama has been represented, and the sanction or adoption of the same gag by the author, will not render it, as a legal accession, a part of his dramatic literary composition, though it has been, with his concurrence, inserted in writing in the manuscript from which the drama was, before such insertion, printed. Much less can ordinary gags, not thus inscribed or sanctioned, become accessions to the composition. If *unwritten* gags could be a subject of proprietary right, as they never can be, they would, as between the dramatic author and the player uttering them, be the player's. As between such a player and the manager or proprietor of the theatre at which he is engaged, if the drama has already been published in print, or, though unprinted, has been so represented on different stages that there is no theatrical rivalry, or competition for its exclusive performance, the friendly communication of the gags by

the player to members of his profession engaged at other theatres, would not, in ordinary cases, violate any confidence resulting from his implied conventional relations to his own employer. The defendants, in their answer, say, that among players interchanges of such professional courtesies are usual. They may not be improper in such ordinary cases. But this was, in every respect, a different case.

I was, therefore, of opinion that the means used by the defendants to enable themselves to imitate the complainant's performance of the play had been such as to entitle her to a decree, independently of the question of her literary proprietorship, on which I avoided the expression of an opinion.

If the defendants, in taking advantage of Mr. Jefferson's breach of duty to his employer, had been innocent parties, not aware of his confidential relation to the complainant, the jurisdiction of the court, so far as exercisable independently of her literary proprietorship, would have been preventive only. As, however, they were privies to and participants in his breach of confidence, if not the procurers of it, they were liable to make her pecuniary compensation. But, though the jurisdiction had been merely preventive, the fund in court would, in this case, have been answerable for the complainant's indemnity. Her application for a preliminary injunction was refused upon the deposit of this money to secure to her an indemnity if the defendants' continued performance of the play should be adjudged a violation of any right entitling her to an injunction. The defendants having continued its performance, this fund is answerable for all damages, not exceeding its amount, sustained by her from such continuance. Out of the fund, she is thus entitled to pecuniary relief, independently of any question of the defendants' privity to the breach of confidence, and independently of any question of her own literary proprietorship.

The amount of this fund was fixed with reference to that which the complainant, before suit, had asked as the price of a license authorizing an exclusive or unrestricted representation of the play by the defendants in Philadelphia. When

this price was asked by her she asserted a claim of statutory copyright. This claim is not maintainable. Had she known then that her literary proprietorship was precarious from its dependence upon effects of publication, she probably would have been willing to grant such a license for a lower price. She named the price, not as the consideration of a proposed compromise, but as her own estimate of the value of the license which a secure copyright would have enabled her to give. There is, consequently, no probability that she will eventually recover an amount which, with the addition of costs, will equal the sum in deposit. It is true that, as her offer was not accepted, she is not precluded from proving, if she can, that a license from her would have been worth more than she asked for it, or that she has in some other mode sustained loss to a greater amount. Her counsel say that the success of the play has been much greater than was expected when she named this price, and urge that the extraordinary excess of profit should neutralize the effect of her proposal. Proof of the actual profits might, for this purpose, be proper for the consideration of a jury. But such proofs might be of little avail against the effect of her own estimate of the value of a license.

The Court, in announcing the foregoing views, added that an issue to determine the amount of the complainant's damages would be ordered, if asked by either party, and that, if neither party asked it, the case would be referred to a master to report the proper amount of her compensation. The court strongly recommended a settlement of the controversy.

The cause formally stood over for the amendment in the description of the citizenship of the complainant. This amendment was not made until July, 1860. When it was made, the defendants filed an addition to their former answer, and also filed a plea. The addition to the answer was not of such a character that it could regularly have been filed in so late a stage of the cause; and it was not relevant, in anywise, to the

amendment of the complainant's bill. But, upon a special reason, suggested by the counsel of the defendants, they were allowed to make the addition as an amendment of their former answer.

The plea which they filed alleged that the complainant was, when the suit was instituted, the wife of a person of a given surname, whose Christian name was not given. He was described as now in Australia; but his calling or business was not specified, nor was his identity in any other manner determined. There was no allegation that her asserted marriage was a newly-discovered fact. On the contrary, the defendants, in the course of examination of a witness, had, more than a year previously, made strenuous efforts to prove that she was married to a person of the surname given in this plea. Their counsel, however, insisted that, as the complainant had amended her bill, they were not only entitled to answer anew, but were, under the 39th rule of equity practice, entitled also to plead, notwithstanding their former answer and present additional answer.

An amendment of a complainant's bill, except so far as it may introduce a new or different case, has not the effect of opening the pleadings in an equity suit. The Court looks back through the pleadings, to ascertain whether, and how far, the amendment may have introduced such a case. So far as it may have been introduced, the defendant may demur, plead, or answer anew. Unless a new case is presented by the amended bill, a defendant's former answer to the original bill overrules any plea which he may interpose after the amendment. The 37th and 39th rules do not apply so as to introduce a contrary practice in this respect. Their purpose cannot have been to permit a defendant, in such a case, to introduce, in a late stage of the cause, matter which might have been insisted on by way of plea when the former answer was filed. If this were, in general, otherwise, matters of abatement and objections to the character of the parties are expressly excepted from the operation of the 39th rule, which is, therefore, inapplicable to this plea. For these reasons, and because the plea

wanted the requisite specification, and omitted certain usual averments, and was not properly verified, the complainant's counsel moved that it should be taken off the file. The Court permitted the complainant, without prejudice to this motion, to set the plea down for a hearing. It was then, upon argument, overruled.

In the interval which had preceded this final adjustment of the pleadings, I had considered the question of the complainant's literary proprietorship, as it had been asserted independently of the copyright laws. The case not having been settled by agreement, and an issue appearing to be necessary, the continued forbearance to express an opinion upon this point seemed improper, as its expression might perhaps have some influence in determining the pecuniary result of the issue. In stating my views of the question, the order in which the subject has been investigated privately for purposes of self-instruction will be pursued.

Proprietorship is a certain or contingent exclusive right of unlimited or limited profitable use of an ascertainable subject, corporeal or incorporeal. Proprietorship, thus defined, is compounded of the proprietor's beneficial rights, and his right of excluding other persons from the use or profit. Any such use as may be of actual or possible advantage or convenience to himself, or any other person, is *profitable.* When the proprietor's right of excluding others from such use, or from the profit of it, is unlimited, as to persons *and* purpose, the proprietorship is absolute. When the right of exclusion is limited, either as to persons *or* as to purpose, the proprietorship is qualified. It is ended when the right of exclusion ceases wholly. The question is, how far the property called *literary* is within the general doctrines of the law of proprietorship. Though not an anomalous it is a peculiar subject of these doctrines.

A LITERARY COMPOSITION *is an original result of mental production, developed in a series of written or printed words,*

arranged for an intelligible purpose in an orderly succession of expressive combinations. The person by whom the composition is primarily thus developed is its *author.* An author and his assigns are included in the meaning of the general phrase, literary *proprietor.*

The uses of the composition consist in, or depend upon, actual or potential communication of the knowledge of the contents.

The communication of such knowledge may be *confidential.* It is of this character whenever conventional or other personal relations of the receiver to the maker preclude any rightful ulterior communication of the knowledge acquired. The simplest example, where the relation is *conventional,* occurs in the case of a loan by a literary proprietor of a book, of which the contents are unknown to others. (See 4 H. L. Ca. 919, 920.) This is a bailment of it, to be read by the borrower, who receives it under an implied confidence, precluding his use of it for any other purpose. (2 Ld. Ray. 915.)

More extended and complicated cases of implied confidence, where the breach of it has been redressed or prevented in the course of the administration of equitable jurisprudence, have been mentioned under a former head. Other examples will hereafter be mentioned incidentally.

Lord Mansfield and Willes, J., in 1769, (4 Burr. 2398, 2399, 2395, 2396, 2312,) and Aston, J., in 1774, (17 Cobb. Parl. Hist. 980,) were of opinion that, even in the absence of confidential relations, rules of decision on questions of literary proprietorship might be deduced from principles of "private justice, moral fitness, and public convenience." But Lord Eldon discarded this doctrine. (3 L. Journ. Ch. 209.) It has been criticised and condemned by De Grey, C. J., (17 Cobb. P. H. 990;) Lord Camden, (Ib. 998;) Pollock, C. B., (4 H. L. Ca. 935, 936;) and Lord Brougham, (Ib. 968.) Some of these judges conceded that what was manifestly *against* the public interest might, for that reason, be *rejected* from the law. But they all concurred that those who administer jurisprudence cannot on this, or any other subject, create and define rights merely because, in their opinion, such rights ought, according

to justice, propriety, and convenience, to exist. Rules of decision on the subject of literary property must, therefore, be sought in doctrines of the common law, or must be traced in principles from which its rules may appear to have been derived.

The present subject of consideration is *literary proprietorship* alone, regarded as independent of any question of confidential relations.

The ordinary definition of *literary property,* as the exclusive right of the proprietor to *multiply copies* of the composition, is, for general purposes, too narrow, because, where the proprietorship exists, the circulation of copies is not the only specific method in which the subject may be profitably used. The definition is thus too narrow for the specific purposes of the present case, where the question to be decided arises from the use of a literary composition in another mode—that of theatrical representation. Literary property may be described as the right which entitles an author and his assigns to all the use and profit of his composition to which no independent right is, through any act or omission on his or their part, vested in another person.

This definition, or description, cannot be applied without a specification of the profitable uses of a literary composition. Their specification includes all such methods of communicating a knowledge of the contents as are not exclusively confidential.

Such communications are effected by reciting or audibly reading the composition, or by circulating it. The recitation, or lecture, or circulation, may be *private* or *public.*

A recitation or lecture before a *select* audience is *private,* and before an *indiscriminate* audience, *public.* This distinction determines the difference between private and public *theatrical representation.* Such a representation of a dramatic literary composition includes its recital.

A *circulation* is an act by which a literary proprietor parts with possession of the original manuscript, or a written or printed copy, for any purpose not exclusively confidential. The original manuscript, however, is very seldom circulated.

The distinction between the *private* and *public* circulation of *copies* is differently determined, as they are *manuscript* or *printed.*

Writing is a method of originally developing the composition, and of *adding* copies made *singly,* letter by letter. *Printing* is a process of *multiplying* the copies, *by sheets.*

Thus the difference is that between *multiplication* and *addition.*

Human means of increasing the number of copies by writing are extremely limited. By printing, they may, on the contrary, in the words of Lord Cranworth, be multiplied *indefinitely.* (4 H. L. 833.) The books printed by those who first publicly practiced the typographic art in Europe usually contained an advertisement that they were not written, as all books had previously been, but were made by a new invention, whereby the several sheets were stamped at once, and not made line by line as formerly. (See Dibd. Typ. Antiq. I. 20.) Judge McLean has truly said, that manuscripts, in modern times, cannot be of *general* use. (4 McL. 304.) In 1519, as we learn from a book published in that year in England, printing had already almost ruined the business of the scribes. (Dibd. II, 480.) In 1693, it was judicially said, that "in primitive times, before printing was invented, writing was found to be an overt act, and made high treason; therefore, printing was, more manifestly, an overt act." (12 How. St. Tr. 1248.) In literature, and in law, every manuscript copy requires a separate authentication; and no such copy can be so authenticated as to become the substitute for an accessible original. But, for *purposes of circulation,* the manuscript from which an authorized edition is *printed* has discharged its office when the copies are struck off; and every copy of the impression is, for such purposes, an authentic counterpart of the others. The printed copies have been judicially designated as *all originals.* (32 How. St. Tr. 82 to 86, 2 Stark. Rep. 130, 114.) Legal as well as practical differences have thus resulted from the disuse of writing and substitution of printing, as the ordinary method of making copies for general circulation. The judicial

recognition of these modern differences has not been attended with any disregard of the rules of ancient jurisprudence. But the practical application of these rules has been modified in adapting them to the change of usage.

The circulation of *written* will be considered before that of *printed* copies.

The distinction between a public circulation of written copies, and a restricted or private communication of their contents, was, for some purposes, recognized before the use of printing. (Wilkins Conc. iii, 317, A. D. 1408-9; Middleton's Dissert, note (u,) A. D. 1410; also in Ames' Typ. Ant. 64; Herbert, 86, and Dibd. I. 321.*) But, except under special and unusual circumstances, an author who then parted with a manuscript copy gave to it the most public circulation of which it was capable. *Now,* the parting by an author with manuscript copies of his unprinted composition is ordinarily regarded as an act of mere private circulation. (2 Atk. 342, 343; Ambl. 737; 2 Swanst. 414; 2 Story, 109 to 112; 4 Duer, 379; 2 Eden, 329; 8 Pet. 657. 661; 14 How. 530, 531; 17 How. 451, 453; 4 McL. 300; 2 Barn. & Ald. 298; 2 De G. & Sm. 652, 691; I Hall & T. 21; 1 Macn. & G. 42.) Under the laws concerning patents for inventions, a previous description of the alleged invention in a "public work," which means a printed book, defeats a patent. But, such a description in an *unprinted* book has, in itself, no such effect. This distinction would, in like manner, determine the novelty of an invention, if those laws had contained no express enactment on the subject. (See the note to Webster Pat., C. 718, 719; 9 M. & W. 302; 15 How. 110.) We have seen that in the copyright laws, likewise, the word *publish* means publish in *print.*

Printed copies also may be circulated *privately.* Their circulation is thus private when they are delivered to a few ascertained persons only, who receive them under conditions expressly or impliedly precluding any ulterior diffusion of the

* Dibdin's translation, in substituting a plural for a singular goes beyond the warrant of the Latin text.

knowledge of their contents. Such a case occurs when a small first edition of a book, printed with a notice on the title page that it is for *private circulation,* is gratuitously distributed by the author among particular persons. Mr. Justice Talfourd, when at the bar, issued, in this manner, the first impressions of his tragedy of Ion. Here the restriction was expressly defined. It may, in other cases, be implied from the selection of the persons, and from the method or attendant circumstances of the delivery. (2 De G. & Sm. 652; 1 Hall. & T. 1; 1 Macn. & G. 25; 4 H. L. Ca. 833, 919, 920.) The circulation must be restricted both as to persons and purpose, or it cannot be called private. The reasons that require this twofold restriction will be stated hereafter, under another head. In the meantime, we may observe that the case of a small first edition of a book, printed by subscription, where the subscribers take all the copies, is not a case of private circulation. Here the persons are, it is true, ascertained. But, the use to be made by them of the copies is not expressly or impliedly restricted.

Any authorized act, such, for example, as a sale, which unrestrictedly sends forth a printed copy—in short, any act of circulation which is not within the above definition of a private one—is a *public* circulation. Thus, in the case of a book printed by subscription, the delivery of a single copy to a subscriber is a public circulation.

Cases for the application of the distinction between the private and public circulation of *printed* books rarely occur. The distinction might, however, under the above-mentioned provision of the patent law, be attended with an important difference.

The *uses* of a literary composition have thus been described, not according to their effects, but with reference to their specific *methods.* The consideration of their effects and consequences will be postponed, in order that the legal *nature* of the composition, the legal *source* of literary proprietorship, and the *objections* to its existence and continuance may be previously considered.

A literary composition is of an abstractly incorporeal nature. Its existence is independent of that of any material on which it may have been produced, or copies of it may have been inscribed or imprinted. (14 How. 451 to 453; 2 De G. & Sm. 716; 4 H. L. Ca. 833.) The incorporeal contents of the original sheets, and of all written or printed copies, are thus one and the same composition. An invention or discovery in art or science may also have an incorporeal existence independent of that of its embodiments. For this reason, and others not here pertinent, exclusive rights of literary proprietors and inventors, even when secured by legislation, depend for their existence, continuance, and enforcement upon reasons peculiarly metaphysical. (2 Sto. Rep. 291; 1 Mason, 472; 2 Blatchf. 246.) The most cautious language of judges concerning such rights is liable, sometimes, to the danger of being found susceptible of a less unqualified application than was intended. (1 Sto. Rep. 288, 291; see 11 How. 606.) In cases not legislatively provided for, this danger cannot be less great.

Inventions, literary compositions, and other primary results of mental development are incapable of any profitable use, independent of actual or potential communication of the knowledge of the results. Actual communications of the knowledge are irrevocable. The original possessor of the knowledge cannot afterwards, by any physical or other process of resumption, deprive others of it, or by any physical means prevent its ulterior communication, or suppress any such diffusion of its fruits as can be directly or secondarily effected through any means which he has once placed at the command of another person.

This physical irresumableness of the knowledge of a primary result of mental development, and the shifting possession, and indefinite number of the embodiments of the results, are incidents distinguishing it, as a subject of asserted proprietorship, from such an easement, or other privilege, as though incorporeal, is exercisable in a fixed corporeal subject. Over such a subject, the proprietor who, in granting the privilege, imposes

conditions on its exercise, may have a physical control. (4 H. L. Ca. 964.)

The embodiments of literary compositions and inventions, though of indefinite number, and uncertain possession, are, nevertheless, *lasting* memorials of the results of the mental processes by which they have been developed. In this respect, they differ from primary results of mental processes whose development is purely intellectual, such as oral discourses. An oral discourse, though studiously prepared and committed to memory, depends for its retention or communication upon a fugitive or evanescent mental impression. Such a result of mental development may be the subject of conventional engagements, express or implied, or of confidential relations, imposing duties cognizable in a court of equity. But it cannot be the subject of proprietary right. (3 L. Journ. Ch. 209, imperfectly reported on this point, in 1 Hall & T. 28, 33, 35, 38, 39.) The case of a literary composition is different. The existence of the author's manuscript, or of a single true copy, suffices to give a durable existence to the literary composition inscribed upon it. (3 L. Journ. Ch. 209; 2 Atk. 342; Ambl. 737; 2 Eden, 329; 2 Swanst. 402; 4 Duer, 379, 382, 385; 1 Sto. Rep. 100; 14 How. 530, 531; 2 De G. & Sm. 691, 692, 673; 1 Hall & T. 21 to 23.) Before the art of printing was known, manuscript memorials of results of intellectual development of unquestioned authorship had been preserved for thousands of years. The typographic art now secures them against even a liability to oblivion until the desire for their perusal ceases. This exemption of printed books from liability to be forgotten through the mere want of copies was one of the consequential advantages of printing proclaimed by those who first practiced the art. The verse of Milton and the prose of Newton have been since judicially designated as *immortal*. (17 Cobb. Parl. Hist. 1000; 4 H. L. Ca. 964.)

The memorials of results of invention may be not less enduring, either through their actual embodiment, or their literary description. But a difference of practical importance distinguishes a literary composition from an invention.

The memorials, however lasting, of an invention or discovery, do not contain any such intrinsic tests of novelty and authorship as are peculiar and inherent in every literary composition. The novelty and authorship of an invention require extrinsic verification. Unless they are attested by an act of State, the invention is not a subject of proprietary right, though, like an oral discourse, it may be the subject of an equitable binding confidence, or of conventional obligation, express or implied. A literary composition is, on the contrary, always the distinguishable result of its author's own mental development.

On this point of *distinguishableness,* the last observation might have been prefaced by the remark that such a composition, as a more or less complex result of successive mental processes, differs from a mere simple result of a mental process or mental processes. Any composition, large or small, which includes results of successive mental processes, *rationally combined,* whether it fill a great volume, or be contained in a single small sheet, is within the legal denomination of a *book.* (2 Barn. & Ald. 300; Cowp. 623; 11 East, 244; 2 Campb. 25, 27; 2 Paine, 382.) But statements, propositions, or sentences, having no connection, or mutual dependence, would not, by being written or printed in motiveless juxtaposition, be brought within the definition of a book or literary composition. Much less would an isolated statement, proposition, or sentence, though written, be within the definition, as it has been understood for thousands of years. (See 2 Wall. Jr. 565; 2 Campb. 26, 27, 28, 30, 32.) Upon this difference, which has, more than the others, been overlooked, the *distinguishableness* of the composition, as the result of its author's mental creative labor, depends. Results of such productive labor, when developed beyond their simplest elements, cannot be *new* without being *original.* A simple thought or statement may, perhaps, through an accidental coincidence, be expressed originally by each of two persons, in a single brief sentence composed of the same words arranged in the same precise order. Such a coincidence, however improbable, cannot be regarded as quite im-

possible. The possibility of its occurrence in a translation, or in a scientific literary production, is undeniable. But, a prolonged series of thoughts or statements, each one in itself simple, cannot have been expressed *originally* by two persons in the same words arranged in the same succession. In language of the mathematician, such a coincidence is infinitely improbable. It has, from experience, been long recognized as absolutely impossible. Practically, this impossibility has been tested and ascertained in the case of even such a book as a directory. (12 Ves. 270; 16 Ves. 269; see 2 Sto. Rep. 793; 2 Russ. 385.) Its authorship is traced through its distinctive peculiarities or occasional mistakes. If it is not capable, in any mode, of identification as the production of an author who is, or may be, known, it is not a literary composition.

Such a composition is, therefore, always an *ascertainable* subject of any legal proprietorship of which it may be capable.

The legal *source* of the proprietary right of authorship, of which the subject has thus been described, is that species of occupancy called *production* as distinguished from invention. To the products of our mental creative labor, we have, as it were, given their existence, *ut in rerum natura essent fecimus.* (ff 41. 2. 3. § 21; Grotius, de Jur. Bel. et P. 2. 3. 3, 2 Bl. Com. 405; 2 Wall. Jr., 564; 2 De G. & Sm. 695; 4 H. L. Ca. 867; Merlin Repert. Tit. Contrefaçon.)

Blackstone refers to classical authorities which show that, in some cases, the dramatic authors of ancient Rome sold their original manuscripts, or first copies of them, to persons desirous of performing them at the theatre. (Com. ii. 407.) The passages which he cites prove that the prices received exceeded greatly those paid for subsequent copies. A theatrical audience at Rome, accusing a dramatic author of what we now designate as a a literary piracy, called him a thief. The subject of the charge was a translation from the Greek of a play, of which a previous translation had, without his knowledge, been already represented at Rome. In justifying himself he drew the line of distinction between translation and plagiarism; and showed

that where two successive translations were independently made, the second was not a piracy. But, except in cases of compositions written for public recitation, ancient authors cannot have had any reason for desiring to monopolize or control the circulation of their literary productions. The danger already mentioned of their being lost in oblivion might not be averted by the circulation of the greatest number of copies that other persons might be willing to make. From the difficulty and the delay in making them, and their great cost, this danger was always impending until the introduction of typography. Until after this period, the doctrine of literary proprietorship cannot have been developed. Its germ is, however, discoverable, perhaps, in the jurisprudence of ancient Rome. In the case of an artist who painted a picture by mistake upon a tablet not his own, supposing it his own, the question whether the picture belonged to him or to the owner of the tablet was discussed by lawyers in Rome. The prevalent opinion was that the artist should have his picture on paying the tablet's value to its former owner. It was thought absurd that the proprietorship of a work of art should be dependent upon that of a thing of so little account as the tablet. (Inst. 2, 1, de rer. div. § 34, ff 6, 1; de rei vind. 23, § 3; 41. 1 de adq. rer. dom. 9, § 2; Caii Inst. 2, 1, de rebus, § 6.) Sir. J. L. Knight Bruce reasoned similarly, in a late case, where unauthorized impressions had been made from copperplates, remarking upon the substantial worthlessness of the material except for that in which its former owner had no property, and comparing the case with an unauthorized circulation of a literary composition. (2 De G. & Sm. 716, 691 to 696.) We read, however, in several passages of the Roman law, that the rule applied, as above, in the case of a picture, was not applicable in the case of a writing. According to these texts, though the writing were in letters of silver or gold, its ownership followed that of the substance on which it was contained, so that if a person inscribed a poem, history, or oration upon the material of another man, it became the latter's property. He could reclaim it, but was obliged to pay to the scribe, who had used it inno-

cently, a compensation for the writing. (ff 6, 1, de rei vind, ubi supra, 41, 1 de adq. rer. dom. 9, § 1; Inst. 2, 1, de rer. div. § 33; Caii Inst. ub. sup.) Thus, in the language of a commentator, an original painting was regarded as of greater account than a mere copy of a literary composition (pictura literarum.) But, as the law of accession was understood in the modern jurisprudence of continental Europe, the rule was different; and the writing belonged, in such a case, to the scribe, who, on paying the value of the paper to its owner, was entitled to keep the copy. (Cujas on Inst. 2, 1, 33, 34; Pothier Propriété, § 173; Code Nap. Art. 568.) Some of the texts of the old Roman law which have been cited may be read as applicable not only to the writing of a copyist, but also to an original composition written, through mistake, by its author, upon the material of another person. But others of the texts do not admit of this interpretation; and perhaps none of them absolutely require it. If the meaning of any of them was that the decision as to a painter's original picture and an author's original manuscript should not be the same, the reason for the rejection of their authority by modern civilians was the stronger. Pothier designates the opinion that the ownership of the paper should carry with it that of the composition as ridiculous. Lord Cranworth, in remarking upon a picture and an engraving as the subjects of a claim of proprietary right, recently said that the difference between them was in the method in which copies of an engraving could be multiplied. He said that a picture was analogous to a manuscript, and that an engraving was the same as a book. (4 H. L. Ca. 833.)

If the measure of proprietary dominion were dependent upon the *source* alone of proprietorship, that of an author and his assigns, thus deduced from his creative labor, would be capable of existing to an unlimited extent. The enjoyment of subjects of *original* proprietary right is less dependent than that of derivative acquisitions upon conditional regulations, imposed from reasons of policy. Under the head of occupancy, the specific proprietary right of *invention* may, indeed, as in the case of treasure found in the earth, or things found

afloat on the sea, depend upon, or be modified by, considerations founded on such reasons. (Bracton, 120.) But no such considerations restrict a *producer's* right of dominion over the fruits of his own labor. Willes, J., nevertheless, was of opinion, that if a literary proprietor had, independently of legislation, a perpetual exclusive right of printing his composition and circulating printed copies, his exercise of the exclusive right might be regulated by implied conditions, requiring him to supply the fair demand for his book by keeping always in the market a sufficient number of copies for sale, at reasonable prices; that his failure thus to supply the demand might be interpreted as a relinquishment of his exclusive right; and that his unfair enhancement of the price might result in a forfeiture of the right of exclusion. (4 Burr. 2310, 2335.) In these views, Gould, J., on grounds of "public convenience," (17 Cobbett Parl. H. 983, 984,) and perhaps also Lord Mansfield, (4 Burr. 2407,) concurred. But Lord Northington had previously expressed a different opinion, (2 Eden, 328,) which Yates, J., quoted with approbation; saying that, if the property existed, "the public would have no tie upon authors or booksellers to oblige them to keep a sufficient number of copies printed," and that the inference of an abandonment from their omission to do so would be impossible. (4 Burr. 2392.) The opinion of Yates, J., in the course of which these remarks were made, has been respectfully mentioned by the Supreme Court of the United States, (8 Pet. 655); and Lord Camden, De Grey, C. J., Pollock, C. B., and the Lord President of the Court of Session in Scotland, were of opinion, that if the perpetual exclusive right existed, it included the right of suppressing the supply. (17 Cobbett Parl. Hist. 1000, 991; 4 H. L. Ca. 936; Boswell's Report of Hinton *v.* Donaldson, pp. 34, 35.)

The contrary notion of Willes, J., and Gould, J., was founded upon assumed analogies in the law of monopolies, and the law as to forestalling, regrating, and engrossing. The analogy to monopolies was mistaken. Exclusive rights within the definition of a monopoly cannot exist anywhere without

the support of an act of state, (3 Inst. 181; 2 Atk. 485; Hawk. P. C. Bk. 1. c. 79; Skin. 169; 10 How. St. Tr. 380, 386, 424, 542); and, in the United States, cannot be created otherwise than by an act of legislation, or under the authority of such an act. (7 Pet. 319; 10 How. 493; 6 Wharton, 46; 11 Pet. 540 to 546; 10 How. 417.) The other supposed analogy was not less mistaken. Forestalling, regrating, or engrossing consisted in the fraudulent enhancement of the market price of necessaries of life, by accumulating stores of them through unfair purchases. But there never was anything illegal in a refusal or omission to sell one's own stores, or in accumulating them otherwise than by unfair purchases. In a time of dearth, or even famine, the product of a man's own land, though a necessary of life, (such as a store of grain,) may be lawfully kept by him on hand. He may illiberally refuse to sell it, or unwisely let it rot in his granary. Even in the case of purchasers which affected injuriously the market, if the article was bought in order that it might become the subject of any industrial process—as where barley was to be malted, or grain worked into starch—its accumulation, though excessive, was never unlawful. (Cro. J. 214; 3 Inst. 195; 13 Co. 18; 2 Brownl. 108; Cro. Car. 231; J. Bridgm. 5, 6; Mo. 595, pl. 810; 2 Keb. 470; 1 East. 155 to 158.) The opinion of Willes, J., therefore, seems to have had no sufficient legal foundation.

Literary proprietorship, having thus a legitimate original source in mental production, the question of its legal *existence*, absolute or qualified, has been resolved into that of its capacity for *continuance* after any profitable use of the composition. That this capacity exists independently of legislation has been denied on three grounds, all of which have been already partially mentioned: the first, that of the impossibility of a proprietary physical control of the embodiments; the second, that of the abstractly incorporeal nature of the composition; and the third, that of the right of public use, which may result from communications of the contents. Sometimes, the first two objections have been considered as one; at other times, the third has been discussed alone, as if it included the others, or super-

seded their consideration. But the three should be considered separately, in the order in which they have been stated.

To the first objection, the answer has been that, according to the general law of property, the criterion of its capacity for continuance is not the retention, by the original proprietor and his assigns, of the possession or immediate control of the subject. The present or eventual ***distinguishableness*** of the subject, enabling him to trace back its identity with what was, in an absolute or qualified sense, his own, suffices for the continuance of his absolute or qualified proprietorship. The proprietorship, thus traced, may have a present or eventual existence, not in the original subject of it, but in a representative product or substitute, which may be specifically similar or different. The distinguishableness may suffice, though embodiments of the subject, or of its products or substitutes, may be multiplied, however changeable may be their positions, and however they may be beyond his control. The unauthorized use of the known trade-mark of a manufacturer, or other dealer, is thus actionable. This having been decided in England, *at law,* in 1824, conformably to more ancient doctrine, (3 Barnw. & Cress. 541; 33 Eliz. cited Cro. J., 471; Poph. 144;), Lord Cottenham in 1838, in a case *in equity,* where no fraud could be imputed, prevented, by injunction, such a use of trade-marks, and said that the plaintiff had *a title* to the marks. (3 Mylne & Cr. 352.) Though Lord Langdale afterwards, in 1842, thought that the right in a mere mark, or name in trade, was not proprietary, but that the remedy was, in such cases, founded alone upon the equitable jurisdiction to redress or prevent fraud, (6 Beav. 73,) his opinion has not been followed. In 1853, Vice-Chancellor Wood called a pin-maker's right of exclusive use of his labels a *right of property* acquired by user. (11 Hare, 78; 23 Eng. L. & Eq. 55.) In 1856, in the Chancery Court of Appeal, the right in a particular *trade-mark* was called by Lord Cranworth a *legal* right, in support of which the jurisdiction of equity was exercised, in order to make it more effectual. (6 De G., Macn. & G. 217.)

This he would scarcely have said, if he had not agreed with Lord Cottenham in thinking the right proprietary. Specific changes of embodiment are exemplified in cases in which the foreign investments, re-investments, and ultimate returns of commercial adventures are pledged, or otherwise appropriated, to secure pecuniary advances on the outward consignments. For such cases, the rules of the present law of the United States and England resemble those which were applied in the ancient jurisprudence of both Greece * and Rome.† The returns from remote regions, in varied specific forms, become the substituted security for the outward adventures. The special property which the lender had in them, for purposes of self-security, is transferred to, and continues in, their product or substitute, in whatever ultimate form of investment, or of re-investment it may exist. (1 Peters, 444 to 448; 4 Wash. C. C. 418, 662; 4 Peters, 291; 1 Bos. & Pul. 563; 1 Curtis, 130; 8 How. 438, 439, 399, 400.) This qualified proprietor may not have any control of the particular destinations abroad, or any right of custody of the subject of his security until the termination of the adventure. The returns, before they reach their ultimate destination may be fraudulently sold, and their proceeds invested wrongfully. The unauthorized investments may then, at the lender's option, be followed; and, so long as they can be distinguished as the product of, or substitute for, the former security, may be reclaimed by him. His proprietary right ceases only when the subject ceases to be thus *distinguishable,* and then ceases only because the means of ascertainment fail. (3 M. & S. 578, as applied in 1 Pet. 448.)

Consequently, as a literary composition and its authorship are *distinguishable,* wherever it may exist, the first objection fails.

The second objection, of its abstractly incorporeal nature, would not, independently of the first objection, render the

* Demosth. in Lacrit. and in Dionysiod.

† Dig. 22, 2. de naut. fœn.; also, 44, 7 de obl. et act. 23; and 45. 1 de verb. obl. 122, § 1; Cod. 4, 32 de usur. 19, 26, § 1; and 4. 33 de naut. fœn.; Paul. Recept. Sent. 2. 14 de usur., § 3.

composition incapable of being the subject of proprietorship. In proof that rights not less abstractly incorporeal may be proprietary, the case of an option, or a turn of an advowson, has been instanced, (1 W. Bl. 338.) The doctrine of the Roman jurists and modern civilians, that a sale and purchase may be valid, though the subject of it has no physical existence, has been followed in English equitable jurisprudence. (ff 18, 1, 8, § 1; Poth. Vente 6; Merl. Repert. Vente § i, Art. i, ii; 8 Price 269, (n.) 1 Jac. & W. 262; 1 Hare 556, 557*; 1 Mylne & K., 488; affirming 4 Sim. 524.) The subject, according to the civilians, may be a simple expectation, or a chance. Examples of the sale of the draught of a net, or of a shot at game, are followed by the remark, that when the seine is drawn or the arrow sent, the price becomes due, though no fish be hauled in, or game brought down. The sale of next year's vintage, or peach crop, or ice cutting, is a disposal not of the grapes, or peaches, or ice, of which there may be none, but of the incorporeal right of taking such grapes, or peaches, or ice, if any, as the seller's vineyard, or orchard, or pond may, during the season yield. The good-will of a trade or business, consisting in the mere probability that old customers will desire to continue their former course of dealing and commercial association, "is a subject of value and price," which "may be sold, bequeathed, or become assets." (6 Ad. & El. 438.) "The advantage of a newswalk" has, accordingly, been "held to be assets" of a deceased person's estate. (5 Bos. & Pul. 70.) An established business may have a value independent of its continuance at the place where it has hitherto been transacted. (6 Beavan 276, 277.) In the case of a newspaper or other periodical journal owned in partnership, the value of the subscription list, upon the death of a partner, does not survive, but must be accounted for by surviving partners in their settlement with his personal representative. (1 Parsons, 298, 280, 297, 303; 7 Simons, 421.) Among living persons, trans-

* Cited 23 How. 129.

fers of such subscription lists have been sustained, and effect has been judicially attributed to the continuance of the former name under which a journal has been conducted or other business carried on. (8 Ves. 215; 17 Ves. 342; 1 Sim. & S. 124; 1 W. Bl. 335; 1 Harris, 242.) The name, in such cases, resembles a manufacturer's distinctive trade-mark, as to which the law has already been stated. Such a mark, when used in an established business, appears to be regarded in France as an accessory of the good will. (See Compere *v.* Bajou, in Upton on Trade-marks, 75, 78, from an authentic report in the New York *Times* of 1 Feb. 1855.) Where products of artistic skill, resembling one another specifically, are made for a particular market by many producers, none of whom can monopolize the market, an exclusive right of one of them to annex a particular mark to products of the specific resemblance offered for sale in the market, is, perhaps, more abstractly incorporeal than the right of literary proprietorship.

The second objection also, therefore, fails.

The third is founded on the *rights of the public.* This objection and the answers to it involve a consideration of the *effects and consequences* of those profitable uses of a literary composition, of which the *methods* have already been described.

A *publication* of such a composition is an act which renders its contents, in any mode or degree, an addition to the store of human knowledge.

Every communication of a knowledge of such contents, or of any other primary result of mental development, unless confidential, is, more or less, a publication.

The peculiarities of the law of literary proprietorship, distinguishing the subject of such proprietorship from other incorporeal property, such, for example, as an easement, are chiefly dependent upon effects or tendencies of publication. That the sole proprietorship of an author's manuscript, and

of its incorporeal contents wherever copies exist, is, independently of legislation, in himself and his assigns *until he publishes it*, is a proposition which has been twice recognized by the Supreme Court. (8 Pet. 657, 661; 14 How. 530, 531; and see 4 McL. 300.) In England, the authorities on the subject have been reviewed in a recent case, in which this doctrine was regarded as established. (2 De G. & Sm. 691; and see 1 Hall & T. 21; 1 Macn. & G. 42.) In a subsequent case, the opinion of this Court appears to have been that literary proprietorship exists when, and continues as long as, an exclusion of others from the use and profit of the composition may consist with legitimate effects of publication. (2 Wall, Jr., 564.)

An *unqualified* publication *dedicates* the contents to the *public*. (See 2 Sto. Rep. 109; 1 Hall & T. 18; 4 Burr. 2335, 2363, 2364, 2365; 8 Pet. 655.) A landowner's express or implied concessions, through which an easement is acquired by the public, are, also, a dedication to the public. But, from the differences in the natures of the respective subjects, the two dedications differ in such of their legal effects as depend upon the dedicating proprietor's own definition of his intended purpose. In the case of an easement, his intention, so far as definable from his acts and omissions, always determines the existence of the rights of the public, and ascertains their extent. (17 How. 426; 5 Watts & S. 141, 143; 8 Ad. & El. 99; 5 Taunt, 127.) Wherever this intention is incapable of taking effect, his dedication is ineffectual except as a mere license revocable at his pleasure. (11 M. & W. 830; 13 M. & W. 838.) The existence of the public easement, in such a case, is thus not less dependent than that of a private easement is in all cases, upon the intention of the proprietor of the land in which it is exercisable. But, when a literary proprietor does an act which has the effect of such a dedication, the public may acquire from it rights independent of any optional definition by himself of his intention. The cases in which this may occur are of two classes.

Cases of one class are those of "dedication to a *limited*

part of the public." Except in the single case of a charitable disposition, unincorporated persons not individually ascertained are legally incapable of acquiring property. That which would otherwise be a dedication to the use of a *limited number* of *unascertained persons* must, therefore, either enure to the benefit of the *whole* public, or take effect as a mere license. The latter is the effect when the existence of an easement is in question. (11 M. & W. 830.) So, in the case of a charitable disposition incapable of taking effect, the former proprietorship continues. But, in the case of a literary composition, the rule is the reverse. Thus, although the number of a theatrical audience was strictly limited, however small it might be, and however high the price of admission, yet, if no discrimination were exercised as to the persons admitted, the representation before such an audience would enure to the benefit of the whole public. (See 12 Ad. & El. N. S. 237.)

Cases of the other class are those of dedication to the whole public for a *limited purpose*. The *purpose* of the dedication of an easement for public use may be limited. (2 Campb. 262 (n); 11 M. & W. 830. See 5 Taunt. 127.) But, here again, the rule as to a literary composition is different. When the composition is published without any discrimination as to persons, a restriction of the purpose, or of the extent, of the publication would be futile. Such a restriction cannot prevent ulterior diffusion of the knowledge of the contents by unknown persons. After such diffusion, the publication could not be suppressed without injustice to other persons to whom the knowledge might have been communicated. The restriction being thus, as to the public, a nullity, the effect of the publication is irrevocable and unlimited.

In the case already mentioned of a book published by subscription, although the subscribers receive all the copies, the effect of the publication is unqualified, because their delivery is unconditional.

In cases under all these heads, though a literary proprietor's publication may thus have effects beyond his control,

he may, nevertheless, consistently with all that has hitherto been said, retain his former proprietary rights, except so far as his acts of publication effectively enable others, either directly or secondarily, to make ulterior publication. In cases of the dedication or easements, the former proprietorship is always retained so far as its rights may consist with rights of the public. How far such doctrine is applicable to literary proprietorship is an inquiry which will not be reached until after some other subjects have been considered.

The foregoing remarks are a sufficient preface to the distinctive definitions of a *limited* and a *general* publication of a literary composition.

A limited publication of it is an act whch communicates a knowledge of the contents to a *select few,* upon conditions expressly or impliedly precluding its rightful ulterior communication, except in restricted private intercourse. 2 De G. & Sm. 692; 1 Hall & T. 18; 4 McL. 300; 2 Sto. Rep. 109; 4 H. L. Ca. 965, 833, 919, 920; 2 Barnw. & Ald. 299, 301; 2 Eden, 329; 2 Meriv. 438; Ambl. 694.)

Any publication which is not thus restricted, both as to persons and purpose, is *general.* When the word *publication* is used without an express qualification, a *general publication* is usually meant. Thus the public circulation of a printed copy or copies is called *publication in print.*

Private and *public* are adjectives which, of course, cannot qualify the word *publication.* But recitations, lectures, and circulations, which are specific *methods of effecting* publication, are, as we have seen, called *public* or *private.* When they are called *private,* the *publication* which they effect is *limited.* When they are called *public,* it is designated as *general.* Recitations, lectures, and circulations, as methods of communicating a knowledge of the contents, are, as we have seen, called private or public, according to their intended specific *purposes,* rather than their tendency to cause a diffusion of the communicated knowledge beyond such purposes.

The idea of this tendency always enters into the definition of a *publication* though it be a limited one. Every transgression of the condition, express or implied, which, in the case of a limited publication, restricts the improper diffusion of the knowledge is, therefore, in a court of equity, redressed as a breach of confidence, not less than as an infraction of proprietary right.

When thus explained, the phraseology which designates a private recitation, lecture, or circulation, as a *limited publication,* and a public recitation, lecture, or circulation as a *general publication,* is, perhaps, not liable to just criticism. But, if the phraseology were liable to any critical objection, convenience, if not necessity, would have suggested its legal adoption, or that of some equivalent expressions. Otherwise, a theatrical representation before a select audience, the circulation of a manuscript, and the restricted circulation of a printed book, which are, in common parlance, called *private,* could not have been designated, as, in any sense or degree, *publications.* The phraseology, whether otherwise liable to criticism or not, has, at all events, been judicially sanctioned. (2 De G. & Sm. 692; 1 Hall & T. 18; and see the other cases last cited.)

In the case of a private theatrical representation of a play of which no printed copy has been circulated, the exclusion of all except the few selected for admission, so defines the condition on which they attend as to preclude ulterior publication. Such publication, by any of the audience, would be redressed or prevented by a court of equity both as a breach of implied confidence and as an infraction of proprietary right.

Lord Brougham compared a case of *private circulation,* described by him as a communication of the contents "to a select few placed under conditions," with a case of a restricted private easement. (4 H. L. Ca. 965.) The context of his opinion shows that he perhaps did not mean to state this as a perfect analogy; but the comparison is, for some purposes, useful. If a man, having a private right of using

a passage by land or water, between two places of his own, uses it as a passage to and from another place of his own, he cannot, because, in doing so, he passed from one to the other of the two first-mentioned places, justify the excessive use of the privilege. In such a case, the argument that, when he had used the passage between the limits designated, he might afterwards pass "whither he would," has not availed as an excuse. (1 Mod. 190, 191; 1 Ro. Abr. 391; 4 M. & W. 773, 774; 11 Ad. & El. 759; 1 Whart. 333; 5 Watts & S. 140, 143; 11 Harris, 348.) So, where an engraver who takes impressions from a plate, or a printer who prints from a manuscript, strikes off more than the stipulated number of impressions, an action at common law lies against him, (1 Barnw. & Adolph, 711;) and a court of equity, on the ground of proprietary right in the owner of the plate or manscript, will not only prevent, by injunction, any use of the copies unauthorizedly made, but will order them to be destroyed. (2 De G. & Sm. 716 to 718; 4 H. L. Ca. 833.)

As publication is not directly effected by printing, but follows it, the rule of decision, in this case of an excess in the number of impressions, would be the same, whether the purpose of the literary proprietor was a general or a limited publication. But, after a publication, the difference in its character, or defined purposes, causes a difference in the judicial purpose of the redress afforded.

In the case of a limited publication, the purpose of the redress is to maintain the privacy which the restrictive condition was intended to secure. When an exclusive privilege has been secured by statute in a book which is publicly circulated, a stranger who, in whole or in part, reproduces it in the new form of a translation, or abridgement, or index, or table of contents, or analytical review, does not infringe the statutory privilege. But either of these acts would violate the rights of the literary proprietor of a book of which the circulation had been private only. (2 De G. & Sm. 692 to 697; 4 H. L. Ca. 833.) The doctrine may be exemplified conversely. Unauthorized impressions of a lawfully pos-

sessed copy of a musical composition, equalling in their number, but not exceeding, that of such members of a musical society as were to take part in a concert at which it was to be performed, were lithographically made, and gratuitously distributed for the purposes of the concert, among these members only. The tracings on the stones were then effaced. In this case, the rights of the proprietor of the musical composition were violated. (12 C. B. 177.) As others than members of the society were admitted to the concert on the payment of entrance money, the case was not that of a private performance or limited publication. If, however, none others had been admitted, so that the performance would have been of this character, the rights of this proprietor would still, according to the reasoning of the decision, have been violated. But, if, before any other publication on his own part, he had himself authorized such an impression of copies as was made, and their distribution for such a private concert, the same reasoning indicates that this would not have had the effect of a dedication of the composition by him to the public.

The legal analogy to the case of a private easement is maintainable so long as the literary proprietor may be able to enforce the restrictive condition, express or implied, on which he may have privately circulated a copy. His difficulty is, not in enforcing the condition against the party receiving the copy, but in enforcing it against other persons not privy to the restriction. In respect of independent rights which such other persons may acquire, the analogy to an easement fails. This leads to the remark that a limited publication through which, contrary to its intended purpose, a knowledge of the contents is diffused indiscriminately, becomes, in effect, as to the world at large, a general publication. The enforcement of the restrictive condition may become impossible whenever the effect of the publication is more extended than its purpose. A book privately circulated may have been read, quoted, reviewed, and remembered, so extensively as to have become a part of the general

stock of literature. This alone, when the restrictive purpose has been imperfectly made known, must suffice to annul the restriction. The case is different where, as in that of Ion, the announcement of the restriction appears upon every copy. But, even in such a case, the limits of any restriction which can be fairly and reasonably imposed, may be exceeded. When it is exceeded, the rights of the public must be regarded. Thus, if the first edition of Ion had been a *full* one, the notice of the author's intended restriction would probably not have effectually limited the character of his publication. He published a *second* edition with a reprint of the notice on the title page. But he prefaced this edition with a concession that the composition could no longer be regarded as his own. Even where the limited publication retains its restrictive character, a greater or less tendency to a diffusion of the knowledge beyond the border of its intended restraint may always exist in modes altogether foreign to the law of easements.

Thus, even in the case of a *limited* publication, irrevocable rights may, through its effects, become vested in the public. The liability or tendency to such effects is a reason for the vigilant exercise of equitable powers to prevent parties and privies to the restrictive condition from performing acts through which the public may thus acquire such irrevocable rights. In discussing the doctrine of literary proprietorship under this head, Sir J. L. Knight Bruce said that "the species or kind of the thing in which property was claimed had, of course, to be particularly considered in considering the question whether a right in it was invaded, and how invasion should, in the particular case, be prevented or redressed; and this class of property, by nature, not corporeal at all, or not exclusively corporeal, required to be defended against incorporeal attacks, and not at all, or not exclusively, against bodily assaults. Upon the principle, therefore, of protecting property, it is, that the common law, in cases not aided or prejudiced by statute, shelters the privacy and seclusion of thoughts and sentiments committed to writing, and desired

by the author to remain not generally known." (2 De G. & Sm. 695.)

Except so far as independent equities may have been acquired by strangers, literary proprietorship of the subject of a limited publication is, therefore, not less entitled than a private easement in land to judicial protection. That the subject, in the former case is personal property, but an easement real property, does not affect the truth of this remark. (See 2 Eden, 329.)

Effects of a *general* publication will next be considered. All the specific effects of such a publication, as dependent upon its different modes, may be exemplified in the case of a dramatic literary composition.

Under this head, the practical question is whether, after such a publication, others than the author and his assigns may lawfully *republish,* in print, or theatrically.

The purpose of the statutes for the protection of literary proprietors is to restrain the rights of others to republish. The cases to which these laws apply have been specified under a former head. We have seen that, in the present case, the rights of the public are unaffected by any legislative restriction.

We have also seen that, as the play in question was never printed, the complainant, as its literary proprietor, could have sustained her suit if the defendants' theatrical representation had not been preceded by her own. This is undisputed. The question is upon the effect of her own previous public performance of the play. This performance was, on her part, an act of *general* publication. The question to be considered is twofold: first, whether this theatrical publication by her, if it had been the means of enabling the defendants fairly to bring out the play at their theatre, would have defeated her suit; secondly, whether, as this publication was not thus the means of enabling them to do so, they can take advantage of it in order to defeat the suit.

Upon the first question the law was formerly involved in

doubt, but is no longer uncertain. An opinion upon it has already been expressed, without any particular statement of the reasons. In the absence of legislation, when a literary proprietor has made a general publication in any of the modes which have been described, other persons acquire unlimited rights of republishing in any modes in which his publication may directly or secondarily enable them to republish. Therefore, the literary proprietor of an unprinted play cannot, after making or sanctioning its representation before an indiscriminate audience, maintain an objection to any such literary or dramatic republication by others as they may be enabled, either directly or secondarily, to make from its having been retained in the memory of any of the audience. We have seen that the manager of a theatre may prevent a reporter from noting the words of such a play phonographically or stenographically or otherwise. As one of the audience, he would, in doing so, transgress the privileges conceded in his admission. But the privileges of listening and of retention in the memory cannot be restrained. Where the audience is not a select one, these privileges cannot be limited in either their immediate or ulterior consequences.

If purchases of manuscript plays, from the earliest periods of theatrical representations, have recognized the literary proprietorship of such compositions as existing until their public performance, we find no trace of any recognition of the continuance of *exclusive* rights in dramatic authors or their assigns after such publication. Among the ancients, the knowledge of polite literature was acquired, and literary tastes were cultivated, not less by attendance at recitations of the bard and the rhetorician, and at representations of theatrical performances, than by reading such few copies of works of established reputation as were accessible. The knowledge thus acquired, and the tastes thus developed, were no longer the exclusive property of the author and his assigns. When a dramatic or other composition, in verse or in prose, had been performed, recited, or sung, to a public assembly, every one of the audience was at liberty to publish elsewhere, at all times, as much of it as he

might be able from recollection to write or to repeat orally. Neither the author, nor those who, by his consent, had first published it, could reclaim it or limit the extent or effect of its primary publication. It might, afterwards, be represented, said, or sung, at will, by other persons, to other audiences, in the same place, or elsewhere. In 1773, Judge Boswell (Lord Auchinleck,) in the Scotch Court of Session, after observing that anciently very valuable performances were preserved only by the memory, and, referring to the cases of Homer and of Ossian, said that, within his own remembrance, the ballad of Chevy Chase had been repeated by everybody. (Boswell's Report of Hinton *v.* Donaldson, p. 5.)

Two plays, The Agreeable Surprise, first performed in 1781, and The Young Quaker, first performed in 1783, which were afterwards the respective subjects of two reported English cases, had been transferred by O'Keefe, their author, to the proprietor of the Haymarket Theatre. The assistance of Mr. Allibone, whose forthcoming second volume of the Dictionary of Authors will contain a notice of O'Keefe, enables me to state that at a much later period than the date of the last of the two reported cases, neither of these plays was contained in any list of regular dramatic publications. (See Gent. Mag., Apr., 1833, p. 376; and Jones Contin. of Baker & Reed's Biogr. Dramat. Tit. O'Keefe, where N. P. signifies not printed.) O'Keefe, in his "Recollections," published after the date of the last of them, states that the plays had "been repeatedly printed and published *surreptitiously*," meaning, without his leave, or that of the party to whom he had transferred them. They were not printed among his dramatic works, also published long after the same date. Thus they never were authorizedly published in print. O'Keefe, with the permission of the proprietor of the Haymarket Theatre, sold a copy of The Young Quaker to the manager of a Dublin theatre, for the express or implied purpose of enabling him to represent it there. A Dublin bookseller printed and published it in 1784, probably from this copy. There is in the Philadelphia Library (D. 4806, (5)) a copy of this edition, which appears to have been issued in the form

of a book printed for general circulation. From the legal reports of the two cases, both very obscure, we cannot infer that either of the plays was judicially known to have been printed. The manager of a theatre at Richmond performed The Agreeable Surprise, without the consent of the proprietor of the Haymarket Theatre, who sued him for the penalty imposed by the statute, (8 An. c. 19,) for an unauthorized publication. The case was decided in 1793. The author, as he states in his Recollections, was examined as a witness on the trial, which was before Lord Kenyon. The only evidence which appears to have been given was the proof of his authorship, of his transfer to the plaintiff, and of the representation by the defendant. The fact that it had been printed, probably, was not in evidence. But the previous frequent theatrical representations of it by the plaintiff during many successive years was, doubtless, either proved or admitted. The verdict having been in his favor, his counsel, on a motion for a new trial, argued that there had been "sufficient evidence for the jury to conclude that the work had been printed, for it could not be supposed that the performers could, by any other means, have exhibited so perfect a representation of the work." This point was not decided. The verdict was set aside on the ground that the only publication by which the statutory penalty could be incurred was a *publication in print*. But Buller, J., said: "Reporting (qu: *repeating*) anything *from memory* can never be a publication within the statute. Some instances of *strength of memory* are very surprising. But the mere act of *repeating* such a performance cannot be left as evidence to a jury that the defendant had pirated "the work itself." (Coleman *v.* Wathen, 3 D. & E. 245.) The case as to The Young Quaker did not occur until the year 1820, when an intended performance of it at the English Opera House was announced by an advertisement at London. The proprietor of the Haymarket Theatre, to whom the author had transferred it in 1783, had been succeeded by other proprietors, who filed a bill in chancery and applied for an injunction to prevent the performance at the Opera House. The application was heard *ex parte*

before Lord Eldon, who, after a difficulty in showing the derivation of the complainant's title had been partially removed, granted the injunction. (Morris *v.* Kelly, 1 J. & W. 461.) That the play had been publicly performed for more than a third of a century by themselves, and those under whom their title was derived, must have appeared. The report, however, states neither this fact, nor on what ground the injunction was asked or granted. Whether the bill was founded on an asserted general right of literary proprietorship, or on the defendants' intended use of a copy of the edition improperly printed in Dublin, or on any and what other assertion of right, can only be conjectured. According to the previous decision in the case of The Agreeable Surprise, Lord Eldon cannot have granted this injunction, as to The Young Quaker, on any assumed foundation of a statutory right in the complainant. In a subsequent case, a complainant had the copyright of Lord Byron's tragedy of Marino Faliero, and had printed and published it for sale, when, without his, or Lord Byron's permission, the defendant represented it theatrically in a curtailed form, under the designation of an abridgement. Lord Eldon sent the case to the King's Bench for an opinion upon the question whether the plaintiff could maintain an action against the defendant for publicly representing the tragedy thus abridged. The Court certified its opinion in the negative. The case does not appear to have been determined on the ground that the abridgement was a fair one, but upon the ground, heretofore stated, that under the only statute of copyright then in force in England, a proprietor of a dramatic literary composition, after a general publication in print, had no redress for an unauthorized theatrical representation. The counsel, on opposite sides, referring to the case of The Agreeable Surprise, which play they conceded to have been acted only, and not printed, called it a different or converse case. This case of Marino Faliero was in 1822. (Murray *v.* Elliston, 5 Barnw, & Ald. 657; see the remarks upon the case in 12 Ad. & El. N. S. 236.)

In an action by the literary proprietor of a play for an un-

authorized theatrical representation of it, if the whole evidence consisted in proof of his proprietorship, his own public theatrical representation of it, and a subsequent performance of it by the defendant, the legal presumption, according to the dictum of Buller, J., would be, that the impression of the plaintiff's own performance upon the memory of his own audience had been, directly or secondarily, the means of enabling the defendant to perform the play. The expression by Buller, J., of this opinion, was altogether extrajudicial. It, probably, was contrary to the opinion of Lord Kenyon, acted upon at the trial.

Such a question of evidence is, perhaps, of little practical importance in a Court of Equity, where a discovery of the means by which a defendant has been enabled to represent a piece theatrically can always be obtained. Thus, in the present case, we know that the complainant's previous performance of the play in question was not the means of enabling the defendants to bring it out at their theatre. The trial of such a question at law must always be, more or less, difficult. But the rule of evidence, as Buller, J., stated it, seems to be dependent upon reasons which, though, perhaps, anciently sufficient, are, according to modern usages, almost obsolete. That a theatrical performance at one theatre can enable performers at another to repeat a play, word for word, or nearly word for word, must often be too improbable for rational credence. Therefore, when a plaintiff has proved his own literary proprietorship, and the conformity of the two representations, the burden of proof ought, perhaps, in an ordinary case, to rest upon the defendant. When like evidence has been adduced in an action by the patentee of an invention, the burden of proof is usually thus cast upon a defendant. When an unprinted play has, for many years, been so frequently performed as to render it familiar to the dramatic profession and to constant attendants at the theatre, a defendant may be able to relieve himself of such a burden by proving that the means of performing it were fairly derived by him from its previous public representation. The law certainly recognizes the possibility that this may occur. Its occurrence may, perhaps, not have been even improbable

in the particular case of The Agreeable Surprise. But this would not establish any such rule of evidence as that which Buller, J., is reported to have stated. If Lord Eldon had followed such a rule, he could scarcely have made the order for an injunction in the case of The Young Quaker. But, independently of the mere question of evidence, the doctrine of the dictum of Buller, J., as to *repetition from the memory of the audience,* may be regarded as established.

At the dates of these decisions, opinions were divided on the more important question, whether a literary proprietor had, independently of legislation, a perpetual copyright. In England, a majority of the judges of the King's Bench decided, in 1769, that such a proprietor had, at the common law, a copyright, through which, notwithstanding his own general publication in print, he retained the perpetual exclusive right of republishing. (4 Burr. 2303.) This decision was in opposition to the views which seem to have been prevalent on the continent of Europe, where, however, the subject was obscured, as it had formerly been in England, by the prevalence of the systems of censorship, and of governmental grants of exclusive printing privileges. A decree in Chancery made in another case, conformably to the decision in the King's Bench, was reversed by the House of Lords in 1774, upon the ground that the copyright, if it existed at the common law in perpetuity, was limited in its duration by the statute, 8 An. c. 19. But, in the House of Lords, the opinions of the judges were taken; and, upon the question, as it would have stood if unaffected by the statute, a majority of them concurred in the previous opinion of the majority of the judges of the King's Bench. (17 Cobb. Parl. Hist. 953 to 1003; 2 Br. P. C. by Toml. 129; 4 Burr. 2408 to 2417.) In the meantime, however, in 1773, the contrary opinion had been expressed by the Scotch Court of Session, in a decision concurred in by twelve of thirteen judges present. (Hinton *v.* Donaldson, Boswell's Report.) An objection to the opinion of the majority of the English judges was, that preventing republication, without the

former literary proprietor's consent, would enable him, at pleasure, to suppress that which had been authorizedly published. To this objection some of these judges had answered, as we have seen, that the continuance of his exclusive right was dependent upon an implied condition that he should keep always in the market an adequate supply of printed copies for sale at reasonable prices. That no such condition could legally be implied has already been fully shown. The objection, therefore, was not sufficiently answered. The opinion of the majority of the judges, or of some of them, was thus founded, in part, upon an erroneous doctrinal assumption. There was, in law, no middle position between two extreme opposing opinions. One of them was that a literary proprietor, notwithstanding an authorized unrestricted publication, retained an unqualified right, indefinite in its duration, enabling him, at pleasure, to sell or to republish on his own terms, or arbitrarily to suppress both sale and republication. The Court of King's Bench had, in effect, so decided. The other, and contrary, opinion was, that, in the absence of legislation, an unrestricted circulation of a printed copy dedicated the composition irrevocably to the public, for every such use, including republication, as could be made of such copy. The Supreme Court of the United States, in 1834, adopted the latter opinion. (8 Pet. 591; see 17 How. 454.) Opposing views of the question had, until then, been entertained. Opinions upon it, in England, continued to differ until 1854, when the preponderance of authority was there determined, conformably to the opinion of the Supreme Court of the United States. This preponderance was thus determined in England by the concurring opinions of Lords Cranworth, Brougham, and St. Leonards, in the House of Lords, against the views which a majority of the judges of the courts of law again expressed. (4 H. L. Ca. 815, reversing 6 Exch. 592, and affirming in principle, 4 Exch. 145, and compare 12 Com. B. 187 with 17 Com. B. 444.)

In cases not legislatively provided for, the public circulation of a literary composition thus authorizes any person to repub-

lish it from any copy so circulated. If it is a dramatic composition, it may be republished either by reprintng it, or by theatrical representation. If we now recur to the case of a dramatic composition which, though unprinted, has been publicly represented on the stage, we will see that the principle applicable must be the same, so far as this representation of it may have been the means of enabling ulterior publication to be made. This brings us to the conclusion, already stated, that if the complainant's previous representation of the play in question had been the means through which the defendants were fairly enabled to represent it, the present suit could not be maintained.

But the complainant's own representation of it was not the means of thus enabling them to represent it; and the final question, which is now reached, is, whether, under such circumstances, the mere fact that she had publicly performed it is to defeat her suit. This proposition is resolvable into the question already stated, whether a literary proprietor who has published in any of the modes above described as *general*, does not afterwards retain his proprietary rights, except so far as, by thus publishing, he may enable others to make ulterior publication, or otherwise to use the composition.

All reasons founded in legal analogies require that such an ultimate proprietary dominion should be thus retained by an author and his assigns. The general doctrine of proprietary right is exemplified in a landowner's retention of his ultimate proprietorship after his dedication of the most unlimited easements to the public. A literary proprietor's retention of a resulting interest after such a publication is perfectly compatible with every other person's unlimited right of republishing, and otherwise using unrestrictedly, that which has been published. In cases which may be stated, a denial of the continuance of such a resulting interest would seem almost, if not quite, absurd. The sale of a single copy only of a first edition of a book is a general publication. In

such a case, if its literary proprietor has possession of all the other copies and of the manuscript from which they were printed, and, wishing to suppress the publication, buys back the copy sold before it has been read, he must stand on the same footing as if he had never parted with it. That, before he got it back, the purchaser may have read it, can make no rational difference, unless the impression on the latter's memory may enable him to make ulterior publication. The supposition of a less extreme case is not required in order to prove the necessity for the retention of a resulting literary proprietorship. In England, the Statute 5 and 6 Vict. c. 45, § 18, enacted that when the proprietor, etc., of any encyclopædia, etc., had employed, or should employ, any persons to compose any articles, or portions thereof, on the terms that the copyright should belong to such proprietor, etc., the copyright therein should be his property, and that he should enjoy the *same rights* as if he were the *actual author*, and should have such term of copyright therein as was given by the act to the authors of books. Notwithstanding this enactment, the proprietor of an encyclopædia, who employs a person to write an article for publication in it, and pays him for the article, cannot, in England, without the writer's consent, publish the article in a separate form, or otherwise than in the encyclopædia, unless it was written on the terms that the copyright in it should belong, *for all purposes*, to the proprietor of the encyclopædia. Shadwell, V. C., in so deciding said that the *original composer* of the article had the copyright in it, *except so far as he parted with it*, and that no reservation was necessary to constitute a right in him. (16 Sim. 196, 198.) The reasoning is not less applicable in the present case than if the proprietary right now in question were statutory.

If the principle in question exists, it must apply to such representations of an unprinted play as are not the means of enabling ulterior dramatic or literary publication to be made. In Macklin *v.* Richardson, the complainant was the author of the farce, in two acts, called Love à la Mode, which had

never been printed, but had been several times performed, with his permission, during six years. He received a compensation for giving such permission, and never permitted the manuscript to be out of his control, always taking it back so soon as the performance of the piece was finished. The defendants, proprietors of a monthly journal, employed a short-hand writer to report the words of this play, by taking them down from the mouths of the actors during its performance. When this had been done, one of the defendants, from his memory, corrected this reporter's notes, and published the first act in their journal, for April, 1766, with a notice that the second act would be published in the next monthly number. The complainant having filed a bill in Chancery for an account and injunction, Lord Northington granted an injunction till answer, which was afterwards continued by him until the hearing. When the cause afterwards came on for a hearing before Lord Camden, the case in the King's Bench, afterwards decided in 1769, upon the question of copyright at common law, was pending in that Court. Lord Camden ordered the cause to stand over until the determination of that case. After its decision, the cause in Chancery was again heard in 1770, when the injunction was made perpetual by the Commissioners of the Great Seal. It had been argued that the previous representation of the farce on the stage was a publication "which gave a right to any of the audience to carry away what they could, and make any use of it," and that the printing it was, therefore, no injury to the complainant. But Lord Commissioner Smythe said that this was a mistake; for, besides the advantage from the performance, the author had another means of profit, from the printing and publishing, and that there was as much reason that he should be protected in that right as any other author; and Lord Commissioner Bathurst said that printing it before the author had printed it was doing him a great injury. (Ambl. 694; 17 Cobbett Parl. Hist. 1094.) It can scarcely be necessary to refer to Morris *v.* Kelly, (1 J. & W. 461,) or any other case, to show that, on the principle of this decree, the per-

formance of Love à la Mode at another theatre, from the short-hand writer's report, would have also been prevented by an injunction.

As the decision in the King's Bench, which preceded the final decree in Macklin *v.* Richardson, has been overruled in England by the subsequent cases in 1774 and 1854, in the House of Lords, it is not altogether unimportant that the prior injunction had been granted and continued by Lord Northington in 1766, before the decision in the King's Bench. Lord Northington's views differed so far from those of the Court of King's Bench, that he had, in 1765,* dissolved the injunction in the very case decided by that Court in 1769.† He, therefore, in continuing the injunction in Macklin *v.* Richardson, must have been of opinion that a resulting literary proprietorship might continue in a dramatic author after a public theatrical representation. In 1849, Sir J. L. Knight Bruce, (2 De G. & Sm. 692,) referring to the cases of The Agreeable Surprise, (Coleman *v.* Wathen, 5 D. & E. 245,) and Marino Faliero (Murray *v.* Elliston, 5 B. & A. 657,) both of which have been fully noticed, said that neither of them was opposed to the decision in Macklin *v.* Richardson. He, therefore, must have considered it as a decision of authority. The authority of his opinion, in 1849, is not affected by the subsequent case in the House of Lords in 1854, because he very carefully avoided recognizing or acting upon the former views which that case overruled.

Macklin *v.* Richardson, if to be followed as an authority, is decisive of the present case. A like remark might be made as to Morris *v.* Kelly. (1 J. & W. 461.) But, independently of these authorities, we have seen that legal reason and analogy are in favor of the existence of a resulting literary proprietorship in an author and his assigns, after a general publication, so far as this publication may not be the means of enabling ulterior publication to be made. Such a resulting proprietary dominion must, therefore, be retained in the case

* 2 Eden, 327.

† 4 Burr, 2303.

of a dramatic literary composition, unless the retention is repugnant essentially to some necessary consequence of a public theatrical representation. The resulting or ultimate proprietary right is defined so as to preclude the notion of any practical repugnancy. There can be no legal repugnancy, if the doctrine of the continuance of literary proprietorship after a qualified or limited publication can be maintained in *any* case whatever. If uses of literary property can be modified by restrictive conditions, its legal nature must be such that a literary proprietor's dedication to the public is also limited in its effects by the extent of the public use. The resulting literary proprietorship, after such a dedication, *might* continue, though a limited publication were impossible, but *must* continue, if the limited publication is, in any case, possible.

The remaining inquiry is, whether the particular doctrines which have been stated under these two specific heads, have, in any respect, been changed by the decision of the Supreme Court of the United States, in 1834, that copyright had no existence at common law, and the conforming English opinions in the House of Lords in 1854. In the United States, the doctrine of limited publication, as above defined, has, in its application to unprinted compositions, been authoritatively recognized, and its rules judicially enforced in cases which have occurred since 1834. (4 McL. 300; 2 Sto. Rep. 100; 4 Duer, 379, 382, 385; and see 14 How. 530, 531.) The general subject is one upon which judicial authority in the United States has led, rather than followed, the course of decision in England. The specific doctrine, as to limited publication, had been established in England, as applied to manuscripts, before the cases in the King's Bench in 1769, and the House of Lords in 1774. The same specific doctrine had been further developed in that country before the general subject was again considered in the House of Lords in 1854. In the case in the latter year, Lord Brougham succinctly and cautiously, but clearly, conceded the specific doctrine; and guarded it by the

restrictions required, in order to maintain its conformity to the principles which now determine the effect of a general publication. (4 H. L. Ca. 965.) His opinion in 1854, and that of Yates, J., in 1769, are the leading ones in support of these principles. (See 8 Pet. 655.) Yates, J., had stated the question to be, whether literary proprietorship existed in perpetuity after an authorized "general publication," using the phrase *general publication* in a sense very like that in which *dedication to the public* is ordinarily used, and conceding a literary proprietor's exclusive right of priority of publication, and his retention of the proprietorship of his *manuscript* after publication. (4 Burr. 2355, 2363, 2364, 2365, 2379, 2390, 2360.) As to the right of priority of publication, he thought that a literary proprietor had the sole right of judging whether he would make the contents "public, or commit them only to the sight of his friends," (p. 2379.) This was approaching as near to the definition of a *limited* publication as the case in question, which was confessedly that of a *general* publication, required. In the course of the same opinion, Yates, J., said that the effect of a publication, meaning of a *general* one, was irrevocable. A dedication to the public of an easement, where the dedicating proprietor's resulting dominion is retained, is likewise irrevocable. Therefore, the irrevocability of the public use of a composition which its literary proprietor dedicates to the public, is immaterial. The question is, whether, subject always to this public use, his ultimate proprietorship may not continue.

The principal argument of those who contended that there was a copyright at common law, was that if the exclusive rights of literary proprietorship were not maintainable after publication, a literary composition could not be used with any sufficient certainty of profit. That of which no profitable use of any kind is possible, cannot become a subject of proprietary right. The argument was, that literary proprietorship was not profitable, except through publication, and that if a first publication gave to everybody an immediate unrestricted right of republishing, the so-called literary property was not property

at all. The premises of this argument were not absolutely true, if a literary proprietor could, in any case, limit the effects of a publication by restrictive conditions, or if he retained, after a general publication, an ultimate proprietary dominion subject to the public use. The opponents of the argument contented themselves, however, with refuting it on the simpler ground that a literary proprietor's exclusive right of priority of publication sufficed alone to render the property of some value, notwithstanding the dedication to the public effected by an unrestricted circulation in print. (4 Burr. 2379; 8 Pet. 657.) The argument was, moreover, by some of its opponents retorted, so as to give to it an apparently self-destructive tendency. Thus, if its premises had been absolutely true, it would have extended so far beyond its intended purpose as entirely to defeat an author's claim to literary property before, as well as after, publication. In proportion as the argument appeared convincing or plausible, its tendency was towards this result. The consequence was that while those who made the argument pushed the claims of authors unreasonably far, one or more of its judicial opponents denied the existence of any literary proprietorship in the incorporeal composition even before publication. Other opponents of the argument, professing to deny only the continuance of literary property after publication, admitted its previous existence in so timid or imperfect a manner as might impliedly have excluded the recognition of a right of making qualified or limited publication in any case. This course of reasoning on opposite sides had a tendency to obscure distinctions which have, in the present case, required full development.

The argument thus apparently answered, by denials of its premises, was not quite refuted by such denials. Its premises, though not absolutely true, were so far, in a relative sense, practically true, that the argument might perhaps have prevailed if it had not encountered another answer.

The more decisive answer was that the foundation of the argument lay in a misconception of the character and extent of the rights of the public in the incorporeal contents of a

printed book which has been unrestrictedly circulated. (2 Wall, Jr., 564.) These rights may include that of republishing it more or less extensively. General readers, and particular students, have their own independent rights of using the knowledge of its contents, and of diffusing this knowledge in modes and for purposes of their own. Its literary proprietor may dislike the modes, or feel no concern in the purposes. He may have opposing interests, or feelings, or prejudices. The literary proprietorship may have been changed. Though the person may have been unchanged, his motives and opinions may have altered. The possibility that authors may desire to suppress their literary productions, and the probability that literary proprietors will sometimes publish in methods unwise, capricious, oppressive, or illiberal, have been judicially recognized. (2 Meriv. 438; 17 Cobb. Parl. Hist. 1000, 991; 4 H. L. Ca. 936; Boswell's Report of Hutton *v.* Donaldson, pp. 34, 35.) The protection of the rights of the public should not be dependent upon the arbitrary will of a literary proprietor, or upon the influence of any motives of self-interest by which he may probably be actuated. These rights of the public, including that of republishing, unless they are legislatively restricted, are not less absolute than his own. He should, therefore, after publicly circulating his composition, have no exclusive privileges except such as may have been legislatively conferred, or such as others may be incapable of exercising.

These were the views which prevailed in the United States, and, ultimately, in England. In reviewing the authorities, it must be remembered that the word *publication,* when unexplained, almost always means a *general* publication. Thus Yates, J., and other judges, have described the effects of publication in the cases of an invention and a literary composition as alike. Here the meaning intended was that the right of public use consequent upon a dedication to the public was, in each case, irrevocable and unrestricted. (4 Burr. 2360, 2361, 2386, 2387. See 2 De G. & Sm. 696.) This doctrine was perfectly true. The statement of it in a case in which the

publication was confessedly general, required no discrimination to be made in consequence of the intrinsic distinguishableness of a literary composition as the production of an author who is or may be known. We have, however, seen that this intrinsic distinguishableness may prevent a properly restricted publication of a literary composition from becoming a dedication to the public, and that such a composition is different, in this respect, from an invention, because the authorship and novelty of an invention require extrinsic attestation. The doctrine stated by these judges implied no exclusion of such distinctions where these differences exist. A limited publication, though not possible in the case of an invention, may therefore, be recognized as quite possible in that of a literary composition. The retention of any resulting dominion over an invention after it has been published may be likewise incompatible with effects of its publication. We have, however, seen that no such incompatible effects ensue from the general publication of a literary composition; but that, on the contrary, the subsequent retention of such an ultimate dominion is a legitimate incident of literary proprietorship.

Since Macklin *v.* Richardson was decided, ninety years ago, no case except the obscurely-reported one of Morris *v.* Kelly, exemplifying this doctrine, has occurred. The unsettled condition of the law of literary property at the dates of those cases, the obscurity in which its doctrines have until a recent period been involved, and the difficulty of applying practically the metaphysical reasoning upon the subject in the books, have rendered an extended investigation of it necessary. The conclusion deduced, under this head, is, that, as the complainant's prior theatrical publications were not the means of enabling the defendants fairly to bring out this play at their theatre, she is, on the ground of literary proprietorship, entitled to a decree. These views are, I think, warranted by those of this court in the case reported in 2 Wallace, Jr., 547. But if the decision of the cause depended on this point alone, I would not make such a decree without a reargument in the presence of the Circuit Judge.

The case recapitulated stands thus: The complainant having the literary proprietorship of this comedy, but no statutory copyright in it, and having publicly performed it at her theatre, with an intention to continue its public performance there, the defendants, against her will, performed it repeatedly at their theatre, without having been, directly or secondarily, enabled so to do through its impression upon the memory of any of her audience. This was an infraction of a proprietary right retained by the complainant. Independently also of such right, she is entitled to redress, because the defendants enabled themselves to represent the play by knowingly taking advantage of a breach of confidence committed by a person in her employment.

If an issue should be asked by either party within ten days, it will be ordered. A special venire may be directed, and the proceeding regulated by suitable orders. Among them should be one that the depositions hitherto taken may be read by either party on the trial. The proper pecuniary measure of the redress to which the complainant is entitled, is the fair value, in November, 1858, of a copy of the play as performed at her theatre, with such a license, authorizing its performance at the defendants' theatre, as she was, according to the foregoing views, able to give.

If a jury should find, or a master should report, a sum exceeding, with costs, the fund in deposit, and the report or verdict should be approved, no final decree will be made until after a reargument, before a full court, of the questions—first, whether the complainant is entitled to any decree on the ground of literary proprietorship, and if not, then, secondly, whether on the ground of breach of confidence, any other than merely preventive redress could, independently of the payment of money into court, have been administered in the case.

If a report or verdict for a less amount should be confirmed, a final decree may be made without a decision of either of these two questions.

Since the foregoing opinion was written, I have seen a re-

port of a decision of Judge Sprague, in a case of Roberts *v.* Myers,* awarding a preliminary injunction to prevent the unauthorized theatrical representation of a play which was the subject of a copyright under the acts of Congress. There had been a public theatrical representation of it before the adoption of measures to secure the statutory copyright. He was of opinion that, whatever might have been the effect of a prior publication in print, the prior theatrical performance had not been such a publication as deprived the literary proprietor of the play of the benefit of the dramatic author's copyright act of 1856. Judge Sprague was also of opinion that this proprietor was entitled to the benefit of the copyright acts, though the play had never been printed, and that he might sue in equity, though he was only an assignee for a limited period of the exclusive right of dramatic representation, and though certain places were excepted from the operation of the assignment on which his title depended. On a question of the proprietorship of a dramatic literary production alleged to have been composed by an agent for his employer, the case was, in all essential particulars, the reverse of the present case. The views of Judge Sprague, so far as applicable to the case now before me, are confirmatory of those which I have expressed, though, as frequently occurs under this head of doctrine, the relative uses of such words as *publication,* etc., may differ somewhat, as their practical applications vary.

DECREE.—This cause having been heard upon the pleadings and proofs and admissions, and argued by counsel, and considered by the court, it appearing that the complainant's literary proprietorship of the comedy in question is derived from a non-resident alien author, the court is of opinion that the complainant has no copyright therein or statutory right of exclusive dramatic representation thereof. But, upon the points involved in the question whether, independently of the statutes in that behalf provided, the complainant is entitled to relief, the court is of opinion, that, as the said comedy has not been

* 23 Law Reporter, 397.

printed, and has never been published otherwise than by theatrical representation, and as the complainant's own theatrical representations of it were not the means through which the defendants were fairly enabled to represent it, their unauthorized theatrical representation of it was such an infraction of rights of the complainant as entitles her to relief. The court is further of opinion that the proper pecuniary compensation for her indemnity in the premises, is the value of such a license under her hand and seal, accompanied with a fairly written copy of the said comedy, as would have authorized and enabled the defendants, after adequate preparation, to bring out the said comedy at their theatre on the 22d of November, 1858, and represent it then, and afterwards, without restriction or limitation, as it was, then and afterwards, there performed.

It is ordered that either party have leave to apply, within ten days hereafter, for an issue to find the value of a license and copy such as aforesaid.

The cause is referred to the master, to inquire and ascertain the difference between the average profits, at such a theatre, of performances of old or well-known plays, and popular new plays, and to report the nightly profits of the actual performance of the comedy in question, at the said theatre, and the number and dates of its performances there; with authority to examine witnesses and parties, and order and compel the production of books, accounts, and other papers, and return such material answers or deposition as either party may request him to return.

If no issue shall have been ordered, the master will report further the pecuniary value of a license and copy such as aforesaid. In ascertaining this value, he will take into consideration, so far as it may benefit the defendants, the price which the complainant asked for such a license when she asserted that she had a statutory copyright.

It is directed that if an issue shall be tried, all or any depositions hitherto taken in the cause may be read, on the trial, by either party, subject to the same objections as if the re-

spective deponents had been offered for oral examination as witnesses. And it is further directed that, if such an issue shall have been ordered, the master, so soon as he shall be able to report, in such manner and form as may facilitate the trial thereof, those matters of which the discovery may, in his opinion, be material to either party, for the purposes of such trial, shall report the same accordingly; confining his report, where both parties do not request the contrary, to such matters of account, or of detail, as cannot be investigated at such a trial without inconvenience, or undue delay.

THE MASTER having reported, under the reference in the above decree, a final decree was made as follows:

And now, April 4th, 1861, this cause having come on to be heard at a former term, and having been argued by counsel and considered by the Court, and having been, to wit, on 26th November, 1860, referred by the Court to Charles F. Heazlitt, Esq., as master, to enquire and ascertain as in the decree of the Court is specified, and the said master having, on the 9th of March, 1861, filed his report, and neither the said complainant nor the said defendants having by their respective solicitors excepted to the said report.

It is thereupon, on consideration thereof, ordered, adjudged, and decreed by the Court that the said report of the master be confirmed absolutely, and that the complainant do recover against the defendants the sum of five hundred dollars ($500), reported by the said master as the proper pecuniary compensation for the indemnity of the complainant for the unauthorized theatrical representation by the said defendants of the comedy called Our American Cousin, in said pleadings mentioned, and that the complainant do further recover from the defendants her costs of this suit.

And it is further ordered, adjudged, and decreed that the said sum of five hundred dollars ($500), together with the said costs (including the master's fee) be paid by the clerk of this court out of and from the sum of fifteen hundred dol-

lars ($1,500) deposited by the defendants in this court under the former decree of this Court dated December 16th, 1858, and that the residue of said fund be repaid to the defendants.

CIRCUIT COURT. NOVEMBER 19, 1860.

EQUITY.

THE UNITED STATES *v.* KOCHERSPERGER.

1. The business of private carriers of letters and mailable packets, even on principal mail routes, is lawful, unless legislatively prohibited.

2. The government's monopoly cannot be extended beyond the legislative prohibition merely because the continuance of a specific business which has not been prohibited would reduce the postal earnings of the government, or even frustrate the purposes of its exclusive policy.

3. The constitutional power to establish state roads as post roads, can be executed only by the designation of actual public highways, present or future, for use by carriers of the mail. The existence and continuance of such highways are independent of congressional control. Congress cannot regulate their use or secure their permanence. When they cease to be common public highways of the respective states, they are no longer post roads. While they are post roads, carriers of the mail use them under the same conditions as the respective states have imposed on their own citizens.

4. But the highways of a state, so long as they are open to the common public use of her own citizens, may be used unobstructedly by carriers of the mail, and cannot be used by private carriers of mailable matter in any mode which has been prohibited by Congress.

5. Public streets, intersecting a municipal town, are highways distinguishable specifically from the general public highways of a state beyond the town limits. They are within the sovereign dominion of the state, but not as part of its general public domain, as to which no just government can legislate with a disregard of local rights and interests of inhabitants of the town.

6. A post for the carriage of letters on a mail route is distinguishable from a local post for their collection and carriage within the limits of a mail station.

7. Post routes and post roads distinguished.

8. Post routes and post roads are not synonymous in the postal act of 3d March, 1851, establishing post routes within cities and towns. And as this act contains no prohibition of the business of the private carriage of letters in the streets of a city, such business is not unlawful, and is not made so by the act of 2d March, 1827, which applies only to post roads. It is otherwise as to mailable matter where the streets are used as established post roads between mail stations.

9. The word "places" in the act of 3d March, 1845, construed not to mean points within the limits of a mail station or postal district. Therefore, the business of the defendants was not within the prohibition contained in that act. It was neither a private *post* within the meaning of the act of 1827, nor a private *express* within the act of 1845.

BILL IN EQUITY filed 11th August, 1860, by the United States of America against Charles Kochersperger, Elbert Kochersperger, Hiram Miller, and John M. Riley, of the city of Philadelphia, citizens of the State of Pennsylvania.

STATEMENT.

The bill sets forth the constitutional right of Congress to establish post offices and post roads; the 3d Section of act of Congress of 2d March, 1827; the 9th Section of act of 3d March, 1845; the 10th Section of act of 3d March, 1847; the 10th Section of Act of 3d March, 1851; an order made and published under alleged authority contained in the act of 1851 by the Postmaster-General, dated 1st August, 1860, declaring all the avenues, streets, roads, etc., within certain wards of said city post roads; and further, the establishment by the government of post offices and post routes in the city of Philadelphia and the regular transportation of the mails therein; that defendants, notwithstanding said order, maintain a post for the conveyance of letters and packets by regular trips within said city for pay, etc.; also that they maintain a private express for the same purpose, and complains of the infringement of the said order and prays that defendants may be restrained by injunction.

DEMURRERS were filed October 1st, 1860.

The question was as to the lawfulness of the Postmaster-General's order.

The defendants, at the time the suit was brought, were engaged as mentioned in the bill, and enjoyed a practical monopoly of their own of the business. It was known as "Blood's Despatch," taking its name from its founder. Their operations covered nearly the whole of the newly-consolidated

city of Philadelphia and had all the appliances of a regular service by post, viz., a central office, corner and intermediate receiving boxes on all the thoroughfares, a full corps of carriers, "foot, post, and horse post," and was in all respects a well-organized and very useful enterprise. It was so much superior to anything the citizens had before enjoyed and so well adapted to their wants that the action of the government towards its suppression was viewed with some anxiety. After the rendition of the following opinion, the controversy was, however, abandoned by the defendants and their enterprise ceased to exist, compensation having been made to them by the government to a certain extent for the capital employed.

The case was argued before GRIER, J., and CADWALADER, J., by *George M. Wharton,* for the United States; *Henry M. Phillips,* for Hiram Miller, and *Robert P. Kane,* for Charles Kochersperger.

The opinion of the Court was delivered by

CADWALADER, J.

Judge Grier authorizes me to state that he has perused the following opinion carefully, and that he fully concurs in it.

A post, etymologically defined, is a mode of conveying written or unwritten intelligence, to and from appointed stations, at regular intervals, or whenever the performance of such service may properly be required. The modes by which intelligence is transmitted through a post, otherwise than at regular intervals, are usually called expresses. Regular posts no longer transmit unwritten intelligence.

A post road is a public highway, whose use by the post is prescribed or authorized by law. A mail is a portable receptacle in which letters, or packets of written or printed sheets, are conveyed by post to an appointed station.

A post office, according to the primary meaning of the word, is an apartment, or building, at an appointed station, for the local transaction of the business of the mail. No postal station is now maintained without such an office.

No government has ever organized a system of posts without securing to itself, to some extent, a monopoly of the carriage of letters and mailable packets. The policy of such an exclusive system is a subject of legislative, not of judicial, inquiry. But the monopoly of the government is an optional, not an essential, part of its postal system. The mere existence of a postal department of the government is not an establishment of the monopoly. When it is legislatively established, it may include one, or more, without embracing all of the subjects of the government's postal arrangements. The business of private carriers of letters and mailable packets, even on principal mail routes, is lawful, unless legislatively prohibited. A private monopolist, secured by prohibitory legislation, cannot require the suppression of a rival business of competitors who do not infringe the prohibition, merely because the continuance of their business would lessen or destroy the profits of his monopoly. A like rule applies in determining the effect of a government's legislative prohibitions to secure its own postal monopoly. The monopoly cannot be extended beyond the legislative prohibitions merely because the continuance of a specific business which has not been prohibited would reduce the postal earnings of the government, or even frustrate the purposes of its exclusive policy. The remedy, if required, is, in such a case, legislative. These remarks are applicable to the laws which Congress has thought necessary and proper for carrying the constitutional power to establish post offices and post roads into execution.

How far, if either post offices alone, or post roads alone, had been mentioned in the Constitution, the carriage of mailable matter by private persons could have been prohibited by Congress, might, perhaps, under certain heads, have been a question attended with difficulties which do not exist under the Constitution as framed. If the necessity or expediency of a postal monopoly is assumed, the wisdom of expressly mentioning both post offices and post roads in the Constitution must be conceded. Neither subject of the two-fold constitutional power is altogether distinct or independent of the other. But, as the

words of the Constitution should be interpreted, each subject of the power is to be regarded as additional to the other. In the present case, the question is, not how far the constitutional power under either head extends, but how far it has been legislatively carried into execution.

The policy of the postal statutes has been to establish, as post roads, those highways in every prescribed or authorized mail route, which are within the general public domain of the respective states. This has been done by declaring the respective mail routes, post roads, authorizing the Postmaster-General to enter into temporary contracts to extend the line of posts, and making prospectively the roads designated in such contracts post roads. The statutes also make all navigable waters on which steamboats regularly pass, from port to port, post roads, and all completed railroads post routes; and authorize the Postmaster-General to contract for carrying the mail on plank roads and navigable canals, declaring them respectively, for such times and such distances as the mails may be carried on them, post roads. To obstruct or to retard the passage of the mail, or to refuse to it the privilege of a public ferry, is made penal. On such general public highways, natural or artificial, the citizens of each State are, under the Constitution, entitled to all the privileges and immunities of citizens of the several States. The states, in surrendering the powers which they have united in delegating to the general government, had no prudential reasons inducing them to restrict its postal authority over such highways.

But the constitutional power to establish state roads as post roads, can be executed only by the designation of actual public highways, present or future, for use by carriers of the mail. The existence and continuance of such highways are independent of congressional control. Congress cannot regulate their use, or secure their permanence. When they cease to be common public highways of the respective states, they are no longer post roads. While they are post roads, carriers of the mail use them under the same conditions as the respective states have imposed on their own citizens. In a case in the Western

District of this Circuit, the Court was of opinion that the act of Congress making all railroads post routes, applied only to railroads laid out and constructed conformably to the legislation of the respective states. A subsequent act of Congress had enacted that certain roads, including a designated railroad, should "be established as *post roads*," and declared this railroad a *post route*. The road was in a route unauthorized by the legislative charter of the company which constructed it. The Court was of opinion that these acts of Congress had not made it a lawful highway. (Cleveland, P. & A. R. R. Co. *v.* Franklin Canal Co., Pittsb. Leg. Journ. 24 Dec., 1853; see 10 Stat. U. S. 250; 9 Harris, 123.) An act of Congress declaring the Wheeling bridge, as it had been constructed at a particular elevation, an established post road, required steamers navigating the river to adapt the height of their chimneys to this elevation of the bridge. This provision as to steamers, though considered by the Supreme Court a constitutional exercise of the power to regulate commerce between the states, was not sustained as an execution of the power to establish post roads. (18 How. 431.) The post-office law authorizes the Postmaster-General to "direct the route or road, where there are more than one, between places designated by law for a post road," and enacts that the road thus designated "shall be considered the post road." But though there is only one road in a prescribed mail route, he cannot, when the road is, from physical obstructions or want of repair, impassable, adopt measures to render it serviceable. The same law requires him in any such case "to report" the fact "to Congress, with such information as can be obtained to enable Congress to establish some other road instead of it, in the same main direction."

But, the highways of a state, so long as they are open to the common public use of her own citizens, may be used unobstructively by carriers of the mail, and cannot be used by private carriers of mailable matter in any mode which has been prohibited by Congress.

In quoting prohibitory statutes which have created or secured the postal monopoly, their penal provisions, their exemptions

of letters carried by special messengers, or of letters carried in a vessel relating to her cargo, and other such particular exceptions, will not be mentioned.

The post-office law of 1825, § 19, enacts that no stage or other vehicle, which regularly performs trips on a post road, or on a road parallel to it, and no packet boat or other vessel which regularly plies on a water declared a post road, shall convey letters. This enactment had, in the post-office acts of 1794, 1799, and 1810, been combined with a prohibition of private foot or horse posts on post roads. But the act of 1825 repealed all prior postal statutes, without re-enacting this prohibition. The right of establishing such private posts existed, therefore, from its date until an amendatory act of 2d March, 1827, revived the prohibition.

This law of 1827, § 3, enacts that no person other than the Postmaster-General, or his authorized agents, shall set up any foot or horse post for the conveyance of letters and packets upon any post road which is or may be established as such by law.

Increased facilities, afforded by steamers and rail cars, afterwards enabled a private letter carrier, travelling in them as a passenger, to transport packages, containing letters and other mailable matter, as his baggage or as freight. The conveyances which he thus used passed regularly over post roads, and often carried the mails for the post-office department. But they had not been *set up*, and were not *specially* maintained as posts. The means by which he carried on the business were ordinarily designated as *expresses*. The Postmaster-General's annual report of 2d December, 1843, stated that numerous private posts, under the name of expresses, had sprung within a few years into existence, extending themselves over the mail routes between the principal cities and towns, and transporting letters and other mailable matter, for pay, to a great extent. This report had been preceded by opinions of two successive Attorney-Generals, upon the effect of the laws which have been quoted. One of these opinions was particularly upon the question of the liability of carriers of such expresses, under the

existing laws. (Opin. Atty.-Gen. iv., 159, 276.) In the years 1843 and 1844, suits upon these laws, for penalties, were prosecuted by the United States in the District Courts for both districts of New York, the Massachusetts District, the Eastern District of Pennsylvania, the Maryland, and perhaps other districts. The defendants were in some cases the principal carriers, whose conveyances were used. In other cases the suits were against the carriers of the expresses themselves. Except in Pennsylvania, and in Maryland, the prosecutions were unsuccessful. The questions, and the points decided in other districts, were very clearly stated in a written opinion of Judge Randall, which was published in the Philadelphia *Ledger* of 9th October, 1844. It appears, from the Postmaster-General's annual report of 25th November, 1844, that the government had been unable to suppress the private expresses, which were still continued "upon the leading post routes." In this, and in the former annual report, he recommended legislation by Congress for their suppression.

Sections 9 to 12, inclusive, of an act of 3d March, 1845, were intended for this purpose. The 9th Section enacts that it shall not be lawful to establish any *private express,* or expresses, for the conveyance, or in any manner to cause to be conveyed, or provide for the conveyance or transportation by regular trips, or at stated periods or intervals, from one city, town, or *other* place, to any other city, town, or place in the United States, between and from and to which cities, towns, or other places the United states *mail* is *regularly* transported under the authority of the post-office department, of any letters, packets, or packages of letters or other matter properly transmittable in the United States mail, except newspapers, pamphlets, magazines, and periodicals. The 10th Section enacts that it shall not be lawful for any stage coach, railroad car, steamboat, packet boat, or other vehicle or vessel, or any of the owners, managers, servants, or crews of either, which regularly performs trips, at stated periods, on a post route, or between two or more cities, towns, or other places, from one to the other of which the United States mail is regularly conveyed under the

authority of the post-office department, to transport or convey any letter or letters, packet or packages of letters, or other mailable matter, otherwise than in the mail. The 11th Section makes it penal for the owner of a stage coach, railroad car, steamboat, or other vehicle or vessel, to convey or transport any person acting or employed as a private express for the prohibited conveyance of mailable matter; and the 12th Section imposes a penalty for the transmission of any such matter by any prohibited means, or for the depositing of it for the purpose of being transported by any such means.

The purpose of these prohibitory statutes was thus to secure to the United States a monoply of the carriage of letters and mailable packets on *mail routes.*

Public streets, intersecting a municipal town, are, as highways, distinguishable, specifically, from the general public highways of a state beyond the town limits. The streets are indeed, as thoroughfares, general public highways of the state. But, independently of this character of thoroughfares, the streets are specially local highways of the town. Internal affairs of municipal towns, affecting their local interests alone, are always regulated more or less by their local governments. These governments are administered in subordination to the paramount authority of the government of the state in which the towns are situated. But, in the legislation of the paramount government affecting local interests of such municipilities, the burdens, necessities, and future welfare of their inhabitants are always to be considered. In the United States the power of uncontrolled legislation on such subjects is exercisable by the several states. They are subjects over which the states have delegated no power of *direct* legislation to the Government of the United States. The streets within the limits of such towns are made and repaired at the charge of the respective towns, or of their inhabitants. The transaction of local business in such streets may, to a greater or less extent, be regulated by local ordinances. Internal regulations of police require especial adaptation to, and observance and enforcement in, the streets. A street in a town is within the sover-

eign dominion of the state, but not as a part of its general public domain. It is a part of the special public domain, as to which no just government can legislate with a disregard of local rights and interests of inhabitants of the town.

The public streets of a muncipal town over which the mail may be carried in any of the routes established by Congress as post roads are, doubtless, post roads for the passage of the mail. Whether streets of such a town can be established by Congress as *post roads* for any other purpose is questionable. The question may not be one of constitutional power, but may concern only the constitutional head under which the power is exercisable. So far as the prohibition of private letter carrying within the limits of such a town may be concerned, the legislative power which is wanting under the head of *post roads* may, perhaps, be incidental to the execution of the power to establish *post offices*. If this be so, the point may be of little ultimate practical importance. But its present importance, from the particular language of the prohibitory and other enactments of the postal statutes in force, is not insignificant.

In some enactments of the postal statutes, the word *post office* designates—according to its primary meaning—a building, or apartment, in which the postal business of a mail station is transacted. Thus the Act of 2d July, 1836, § 36, requires every postmaster to reside in the city, or town, in which his office is situated, or in the district of country which it usually supplies. The word has also this meaning in the 17th and 6th Sections of the post-office act of 1825. These two sections contain the only prohibitory enactments by Congress, expressly securing the postal monopoly of the government, which have not already been cited. The 17th Section, repeating enactments of prior laws of the United States, which had been adopted from British statutes, provides that no vessel arriving at any port where a post office is established shall be permitted to report, enter, or break bulk, until all letters directed to any person or persons in the United States, or their territories, brought in her, under the care or control of her master or commander, shall have been delivered to the postmaster. The 6th

Section requires every master or manager of any steamboat, passing from one port or place to another port or place where a post office is established, to deliver all letters and packets addressed to, or destined for, such port, or place, to the postmaster there; and requires every person employed in any steamboat to deliver every letter and packet of letters entrusted to him, to her master or commander, before she shall touch at any port or place.

But, in postal statutes, the word post office frequently has another meaning. The postmasters are not, in any respect, carriers of the mail. (7 Cranch, 267; 8 Watts, 453; Cowp. 764.) The business of their offices includes many local arrangements in, and near, their stations, or districts, which Congress, in executing the power to establish them, has, necessarily, regulated. The word post office, as used in the statutes, therefore, frequently designates a mail station, or the postal district of such a station. The station may be a single detached house in which the post office is kept. A post office may be in a village, or in a municipal town, small or great. In the United States, a mere village is not, for postal purposes, usually distinguishable from such parts of the rural district in which it is situated as contain only detached houses. But, where the site of a post office is a municipal town, the whole space within its limits, beyond the walls of its post office, is usually included within the station; and is, for many postal purposes, distinguishable from exterior spaces. Adjacent built spaces may be included in the postal *district* of the town. If the corporate limits of the town embrace unbuilt spaces, they may be excluded from its postal district. But either the whole town, or its whole postal district, may be, and usually is, a single postal station. Some postal statutes, hereafter quoted, apply only to such sites of post offices as are incorporated under the name of cities. Other statutes apply to cities and other principal post towns. The principal post towns are distinguishable from those of secondary importance by a difference in the methods of appointing the postmasters. Under the act of 2d July, 1836, the President appoints them at places where the annual commissions

have amounted to $1,000. At other places they are appointed, under the act of 3d March, 1825, by the Postmaster-General. Thus New York, Philadelphia, and the other great cities, and all other municipal towns, whether cities or not, at which the respective postmasters are appointed by the President, may be classed as principal post towns. But the primary general division here, and in England, is into post towns and rural districts. The Supreme Court of the United States has used the word post town as including, in a general sense, all spaces other than those designated as rural. (1 Pet. 583; 2 Pet. 651.) The legal definition of a town accords with such a general use of the word post town. (Co. Litt. 115, 116.) Lord Mansfield, referring to the words, "any town or place," in an English postal statute, said that they were used because, at some stages, there was only a single house, but that the whole of a town was considered as one spot, and referred to a prior case, in which the Court had "considered the city of Gloucester as the post town or place in opposition to limits out of the town." (Cowp. 188.)

The constitutional power of Congress may, perhaps, as to some subjects which have been mentioned, be executed under the head of either post offices, or post roads, or partly under the one head, and partly under the other. But, of other subjects of the power this cannot be said. Under the head of *post roads,* the power seems to have been properly executed in designating highways for use in mail routes, and in protecting and regulating such use. Under the head of *post offices,* the power is properly executed by establishing mail stations, and regulating their postal business and its incidents.

According to this classification, a post for the carriage of letters on a mail route is distinguishable from a local post for their collection and carriage within the limits of a mail station. The former has been called a *general* post. (Cowp. 188.) Such a post has already been sufficiently described.

The local posts, of which, as yet, nothing has been said, are special arrangements of comparatively modern origin. Their establishment has been preceded, perhaps, everywhere, by the

employment of letter carriers for the local delivery of the contents of mails. The business of such official carriers as thus deliver letters received by mail may be combined with deliveries of *drop letters*. These, in the language of the Act of 3d March, 1845, § 1, are "letters placed in any post office not for transmission by mail, but for delivery only." This twofold official business of the carriers employed for the delivery of letters received at post offices differs from that of official carriers employed in the special *collection and delivery* of letters for a local post. The difference exists alike whether the respective duties of the two employments are performed by different persons, or, in whole or in part, by the same carriers. The business of letter carriers who deliver letters received at post offices, including drop letters, will be first considered. The special business of the official carriers of the public *local* posts will, afterwards, be considered separately.

The business of a *general* post, consisting in the carriage of letters and packets by mail, is completed by their delivery. In England, a retention of them at the post office of destination until they should be called for was not, in general, considered a delivery. (3 Wils. 453; Cowp. 182.) In general, therefore, no compensation for delivering them elsewhere could be charged as an addition to the statutory mail postage. Way letters were, to some extent, collected and delivered by mail carriers on post roads at point inconveniently distant from any post town. This was probably done only in sparsely-peopled rural districts, in order to obviate the necessity for increasing the number of unproductive post offices. (See Stat. 9 An. c. 10, s. 33.) The persons to whom way letters were thus delivered paid no more than the statutory mail postage. (3 Wils. 450, 451.) When the post office of a station was a single detached house in the country, the deliveries were made at it, the letters remaining there until called for. (Cowp. 182, 189.) This, probably, was the rule, or practice, at most, if not all, the rural stations. But, in the post towns, including London, the letters were deliverable, within the town limits, at the houses of residence, or sojourn, or business, of the respective persons

to whom they were directed. They were thus deliverable in the town without any charge in addition to the mail postage. But, the letters directed to persons beyond the town limits were considered as deliverable at the post office. These letters might remain at the respective post offices, therefore, until called for. The postmasters, or letter carriers of the post offices, who extended their deliveries beyond the respective town limits, were thus at liberty to derive an emolument from this extension of the business. Persons beyond the town limits, who did not prefer calling at the post office, paid a compensation for the carriage of their letters in addition to the mail postage. English legislation of two centuries ago indicates that this extension of the letter-carrying business was then a source of actual or expected profit. The same legislation shows that a prohibition of private letter carrying within the limits of a post town was not then implied from an enactment forbidding the carriage of letters by a foot or horse post, but that, when the private carriage of letters within such a town was to be prevented, it was forbidden by a distinct prohibition.

The Post-Office Department in England was first permanently organized in 1656, by an ordinance for which the act of 1660, (12 Car. 2. c. 35,) passed at the restoration, was a substitute. Of the prior arrangements of the government with successive patentees and farmers of the posts, the last had been a contract made by the Council of State in 1653, confirmed by an ordinance of 1654, farming, for two years, the office of postmaster, foreign and inland, and prescribing regulations of the office. It ordained that the farmer should have the exclusive care and charge of the postage and carriage of all letters and packets, foreign and inland, from all persons, and in all places, of England, Scotland, and Ireland, and to and from all other places within the dominions of the commonwealth, that no person other than himself and his deputies should set up any post, or keep horses, or any packet boat, or boats, for the carrying or sending of letters, inland or foreign, and prohibited all posts, and carriers post, to or from any town or place within the commonwealth or its dominions not licensed by him

or his deputies. This ordinance did not prohibit private letter carrying otherwise than by post, but prohibited private posting as fully as the acts of Congress of 1825 and 1827. The ordinance of 1656 secured the monopoly to the Postmaster-General and his deputies by prohibitions which, though somewhat amplified in expression, did not, in effect, extend beyond those of the ordinance of 1654. But, the act of 1660 contained a twofold prohibition, forbidding private *letter carrying* as well as *private posting*. It enacted that no person other than the Postmaster-General, and his deputies, should *carry*, recarry, and deliver *letters* for hire, *or* set up or employ any *foot post, horse post, coach post, or packet boat* whatever, for the conveying or carrying of any letters or packets by sea or land, within the dominions of the Crown. It was provided that nothing in the act should be understood to prohibit the carrying or recarrying of any letters to or from any town or place to or from the next respective post road, or stage appointed for that purpose, but that every person should have free liberty to send and employ such persons for the purpose as he should think fit. Thus, all private letter carrying, not included in this and other particular exceptions, was prohibited. The contrast of the former ordinances, and this act of 1660, shows that though, by the latter, private letter carrying elsewhere than on mail routes was forbidden, it was not included in the phrase private posting, or understood to be forbidden by a prohibition of such posting. This was not less indicated in the post-office act of 1710, which supplied that of 1660. The modifications in the act of 1710 were especially consequent upon the establishment of local posts which had been introduced in the meantime.

The motive of extending the prohibition of private letter carrying by the act of 1660 must have been to secure to the official letter carriers of the post towns an emolument from their deliveries beyond the town limits. But as the villages became towns, and the population of the towns increased, the spaces within which the postmasters were compellable to deliver letters, without any charge, were extended. Their emoluments from the carriage of letters were thus diminished as their bur-

densome duties were increased. In the smaller post towns, which were about four-fifths of the whole number in the kingdom, the postmasters declined making deliveries, except at the respective post offices, without an additional allowance. (Cowp. 189, 186.) In 1768 it was decided that no postmaster could lawfully demand an additional payment for delivering letters at private houses in a post town. (4 Burr. 2149; 5 Burr. 2711, 2709.) But, the postmasters still insisted that the post offices were the only places at which they were bound by law to deliver letters, and that persons unwilling to make the extra payment could not require the deliveries to be made at the respective places of their abode. In this position, the postmasters appear to have been at one time sustained by the Postmaster-General. (5 Burr. 2710.) But the point was afterwards judicially decided in the Common Pleas in 1773, and King's Bench in 1774, against this opinion. (3 Wils. 443, Cowp. 182.) The decisions were that, in all post towns, the deliveries must be made, for the mail postage only, at the respective private residences of all persons whose residences were known or could be found. But the rule of decision was not applicable to letters for persons residing beyond the town limits. After these decisions, the course of business was to suffer letters for such persons to remain in the post offices until called for. (2 Smith, K. B., 404, 405.)

The general provisions of the English post-office acts of 1660 and 1710 were, in express terms, applicable to the colonies. While the act of 1660 (12 Car. 2, c. 35) was in force, the office of Postmaster-General for the colonies was created, and its administration aided by colonial legislation. The act of 1710 (9 An. c. 10) expressly authorized the establishment, with the approval of the English Postmaster-General, of a chief post office in each colony. This act was in force until the War of Independence. It was afterwards consulted by those who drew the earlier postal statutes of the United States, and was the source from which some provisions of acts now in force were derived. But local reasons rendered many of its regulations inapplicable in the colonies. Insuperable difficulties would

have prevented any general organization of a system of deliveries of letters in them except at post offices.

The Congress of the United Colonies, in July, 1775, appointed a Postmaster-General, under whose direction a line of posts was to be established with cross-posts. The articles of confederation of 1778 gave to Congress the sole and exclusive right and power of establishing and regulating *post offices from one state to another* throughout all the United States, and exacting such postage on the papers *passing through* the same as might be requisite to defray the expenses. The preamble and enactments of an ordinance of 18th October, 1782, regulating "the post office of the United States," indicate that the congress of the confederation defined its own legislative power for postal purposes "throughout all the United States," as if the article conferring it had not contained the words "from one state to another," or as if these words had not been of restrictive import. As mail routes within a state were essential to a postal communication between the states, the words could not have excluded the power of establishing such mail routes. This ordinance enacted that a continued communication of posts should be established under prescribed regulations, and that the Postmaster-General and his deputies, and no other person, should have the receiving, dispatching, sending post, carrying, and delivering of any letters, packets, or other despatches, from any place within the United States, for hire or profit, but that private cross-posts might, with the consent of the Postmaster-General or his deputy, be employed on any cross-road until a public rider could be established on it. The first Congress under the present Constitution enacted, in 1789, a law for "the temporary establishment of the post office," authorizing the appointment of a Postmaster-General, whose powers, and the regulation of the post office, were to be the same as they last had been under the resolutions and ordinances of the Congress under the former government. This law was annually renewed until 1792, when it was temporarily supplied by "an act to establish the post office and post roads within the United States," which was to remain in force for two years.

The latter act was altered and supplied on 8th May, 1794, by the first permanent post-office law of the United States. As the act of 1794 was also the first law of the United States which mentioned letter carriers at the sites of post offices, or drop letters, its prohibitory enactments which defined and secured the postal monopoly should be compared and contrasted with those of the previous temporary act of 1792. The law of 1792 (§ 14) made it penal for any person other than the Postmaster-General or his deputies, or persons by them employed, to take up, receive, order, dispatch, convey, carry, or deliver any letter or letters, packet or packets, other than newspapers, for hire or reward, or to be concerned in setting up any foot or horse post, wagon, or other carriage, by or in which any letter or packet should be carried for hire, or any established post road, or any packet or other vessel or boat, or any conveyance whatever, whereby the revenue of the General Post Office might be injured. The law of 1794 substituted for these prohibitions an enactment (§ 14) which only prohibited any person other than the Postmaster-General or his deputies, or persons by them employed, from being concerned in setting up or maintaining any foot or horse post, stage, wagon, or other stage carriage, on any established post road, or any packet, boat, or other vessel, to ply regularly from one place to another, between which a regular communication by water should be established by the United States, and from receiving any letter or packet other than newspapers, magazines, or pamphlets, and carrying the same by such foot or horse post, stage, wagon, or other stage, carriage, packet, boat, or vessel. The exception as to newspapers, etc., is no longer in force. In other respects, the prohibitions of this act of 1794 were the same as those in the acts of 1825 and 1827, now in force, which have been quoted.

The act of 1794 (§ 28) authorized the employment at such *post offices* as the Postmaster-General should direct of carriers for the delivery of letters at the *places* respectively where such post offices were established, except letters to persons who might, in writing, request them to be detained in the post office. The

act allowed a certain compensation to the carriers for the delivery of every letter received by post, and ascertained the postmaster's compensation for every drop letter. These enactments were repeated in the laws of 1799 and 1810, and, with a slight verbal alteration, in the act of 3d March, 1825, the provisions of which section, except that the letter carriers' compensation has been reduced, are now in force.

Thus, the business of the carriers who deliver letters received at the post office of a mail station is not regulated, in the United States, as it was in England at the date of their independence. But, notwithstanding the differences of the regulations in the two countries, the towns which include the respective districts of such letter carriers are, in the United States, for postal purposes, not less than in England, *single places*. We have seen that, in England, the business of such letter carriers in a post-town was not that of a distinct independent post. The differences of regulation in the United States do not bring this business, as a separate one, within the statutory definition of a carriage by *post*. If this had not already been shown, it would be proved by the description of a drop letter in the acts of 1794, 1799, 1810, and 1825. Such a letter is described in them as one "lodged at any post office *not* to be carried *by post*, but to be delivered at the place where it is so lodged." That carriage by post here meant carriage by *mail* appears from the language in which this definition of a drop letter was repeated in the passage already cited from the act of 1845.

No act of Congress, hitherto quoted, indicates, on the part of the government of the United States, a purpose to monopolize the local business of letter carrying in a post town. On the contrary, the omission in the act of 1794, and in the subsequent legislation, of every word used in any prior statute on either side of the Atlantic which could possibly have been thought applicable to such letter carrying, as distinguished from private letter carrying on mail routes, proves that Congress intended to prohibit the latter business only. The letter carriers of the post offices in towns would have had no motive to desire any prohibitory statute for their protection, if drop

letters had not been included in their deliveries. Their superior facilities of access, in the post offices, to the contents of the mails, would have secured the priority of their deliveries over those of private carriers calling there for letters. Through this priority, the official carriers would have had a practical monopoly, so long as the service of a competent number of them was properly performed at reasonable rates of charge.

Local posts will next be considered. These, as has already been observed, are special arrangements for the carriage of letters and packets to and from subordinate stations *within* the limits of a mail station. Such special posts, private or public, become necessary when the buildings of a populous mail station cover an extensive space. The business of such posts, when transacted by a government, is altogether independent of the reception or delivery of the contents of the mails. A government which monopolizes the business of letter carrying in a populous post town, must establish such a system of postal stations within the town limits. A government which does not monopolize the business within the town, may also, for the accommodation of its inhabitants, establish such a system of internal posts. This may be done by an extension of the drop-letter system, through arrangements for a subsidiary collection, by postal officials, of letters and packets, at convenient points of reception or deposit within the town, beyond the walls of its post office. When other offices are established for this purpose at any of the subordinate stations, they are called sub, or branch, post offices. Though the primary receptacles of the letters are not *offices,* but mere appointed places of deposit, the local collection and carriage of the letters is a species of post.

The word post office, when used without any qualification, designates not a branch post office, but a post office at which mails arrive. So, the word *post,* used without qualification, express or implied, signifies a general post, and not a mere local post within the limits of a mail station. But the relation, or context, of the word post, may so qualify it as to show that a

special or local post is intended where no qualification is otherwise expressed.

In England, the type of such a post is the penny post of London. This post was first established while the above-quoted prohibitory enactments of the English post-office law of 1660 were in force. It originated in a private post established within the city, and the built suburbs, by letter carriers, whose business was conducted without the sanction of the post-office department. The prohibitory provisions of the act of 1660 enabled the department to suppress the business as a private enterprise. It was taken out of the hands of its projector into the management of the government; but he received a compensation from the government. A subsequent private undertaking of the same kind, called the half-penny post, was also suppressed by the government while the act of 1660 was in force. This act contained nothing which expressly sanctioned the charge by the government of a penny upon every letter and packet carried by this post. But, as no such service was prescribed by the act, the charge, when the service was performed, was, perhaps, not unlawful. The post-office law of 1710 contained enactments which indicate, however, that some doubt may have existed as to the lawfulness of this charge, and also some doubt of even the sufficiency of the prohibitions in the act of 1660, to prevent private letter carrying within the limits of a post town. The act of 1710, among the prescribed rates of postage, included one penny upon every letter and packet passing or repassing by the carriage called the *penny post,* established and settled within the cities of London and Westminster, and borough of Southwark, and parts adjacent, and to be received and delivered within ten miles from the general post office in London. This act prohibited all persons other than the Postmaster-General, or his deputies, from receiving, dispatching, conveying, carrying, recarrying, or delivering, any letters or packets, *or* making any *collection* of letters, *or* setting up, or employing any foot post, horse post, or packet boat, or other vessel or boat, or other person or persons, or conveyance, for the receiving, dispatching, conveying, carry-

ing, recarrying, or delivering, any letters or packets, by sea or by land, or on any river within the dominions of the crown, or by means whereof the same should be done. But nothing in the act was to be understood to prohibit the carrying or recarrying of any letters or packets to or from any town, or place, to or from the next respective post road, or appointed stage, *above six miles* from the general post office in London, or the chief offices of Edinburgh and Dublin; and every person was to have liberty to send and employ such persons for the purpose as he should think fit; provided that nothing therein contained should authorize any *collection* of letters to be made in or near London, or the suburbs, under pretence of conveying the same to any parts or places in the city, or suburbs, or to the general post office of London, without the license of the Postmaster-General. The limits of the business of the penny post were enlarged in 1732 by the statute 4 G. 2. c. 33. This act authorized the charge of an additional penny for deliveries beyond the former limits. These former limits were afterwards understood to include all such suburbs as had been covered with rows of contiguous buildings in 1710. (Cowp. 624.) The opinion which seems to have been afterwards entertained was, that the Postmaster-General could not, without further legislative authority, establish such a post in any other town, on such a footing as to be secure against competition with private letter carriers. This appears from a statute of 1765, (5 G. 3. c. 25, §§ 11 and 12,) which authorized him to establish an office, to be called *The Penny Post Office,* in any city or town, and the suburbs thereof, and places adjacent, in Great Britain and Ireland, and the British dominions in America, and to demand and receive the same rates for the postage of letters and packets conveyed by such penny posts as were, or might be, taken for the carriage of letters and packets by the penny post established in the cities of London and Westminster, and borough of Southwark, and parts adjacent, according to the extent and meaning of the acts of 1710 and 1732, and of this act; and that, when such penny post office, or offices, should be established, *no person should,* without the Postmas-

ter-General's license, *make any collection of letters or packets,* in or near such city, town, suburbs, or places where the same should be established.

If any measures, under this authority, were adopted by the British government before the Declaration of Independence, for the establishment of a penny post anywhere within the present limits of the United States, no such measure was carried permanently into execution. The review of the English statutes on the subject has been thought necessary, because they are legislative precedents indicating that a mere authority to establish a penny post of the government in a town does not imply that, when it is established, private letter carrying in the town is prohibited. They indicate also that something more than a general enactment forbidding private posting is required in order to prohibit private letter carrying within the limits of a local post.

The first in date of the acts of Congress of the United States which expressly sanctioned the establishment of local public posts within the limits of mail stations was the act of 2d July, 1836. This act, § 41, authorizes the Postmaster-General, whenever proper for the accommodation of the public in any *city,* to employ letter carriers for the delivery of letters received at the post office in the said city, except letters for persons who may, in writing, have requested them to be retained in the post office, *"and for the receipt of letters at such places in the said city as the Postmaster-General may direct, and for the deposit of the same in the post office."* The provisions of this enactment concerning the employment of carriers of letters received at the post office were, in effect, a repetition of the provisions of the act of 1825 on that subject. They must have been introduced in order to preclude any implication of an intention to change the prior system of delivery of such letters. The only part of the act of 1836 which concerns the subject of present consideration was the authority to employ carriers for the primary receipt of letters at places other than the post offices of the respective cities. Before arrangements of this kind were thus expressly authorized by this act, they had been, to some

extent, made by the postmasters at one or more cities. The second section of an act of 18th May, 1842, required the "postmasters at New York, Boston, Philadelphia, Baltimore, and New Orleans, and the other several cities of the Union" to account thereafter for all emoluments or sums received for boxes, or pigeon holes, or other receptacles for letters or papers, or for the delivery of letters or papers *at or from any place in either of the said cities other than the actual post office of such city,* and for all emoluments, receipts, and profits, from keeping *branch post offices* in either of the said cities. An act of 3d March, 1847, authorizes and directs the Postmaster-General to establish, when, in his judgment, the public interest or convenience requires it, one or more branch post offices, to facilitate the operations of the post office in any city or place which, in his opinion, may require such additional accommodation for the convenience of the inhabitants; and makes it his duty to prescribe regulations for such branch post offices, and provides that no additional postage shall be charged for the receipt or delivery of any letter or packet at any branch post office. A law of 3d March, 1851, § 10, enacts "that it shall be in the power of the Postmaster-General at all post offices where the postmasters are appointed by the President of the United States, to establish post routes *within* the cities or towns, to provide for conveying letters to the post office by establishing suitable and convenient places of deposit, and by employing carriers to receive and deposit them in the post office; and at all such offices it shall be in his power to cause letters to be delivered by suitable carriers to be appointed by him for that purpose." And an act of 15th June, 1860, has authorized the Postmaster-General to establish boxes for the delivery of letters at the outside stations in the suburbs of cities if it can be done without loss to the department or injury to the service.

Under the respective authorities conferred by the laws which have been mentioned, branch post offices have been established in the city of Philadelphia, and also boxes for the reception of letters and packets at other places in the streets of the city.

As the postal business within the station has been regulated, the letters and packets received in these branch offices, and in the boxes throughout the city, are collected and carried to the Philadelphia post office.

In the five enactments which have been quoted as authorizing or sanctioning the establishment of posts *within* the limits of mail stations, we find no prohibition of the business of private letter carriers within such limits. Congress has, on the contrary, omitted to insert the prohibitions of which legislative precedents would have suggested the adoption, if it had been intended to forbid such business. Of the five enactments, none except those of 1847 and 1851 apply to any mail station whose municipal character is not that of a *city*. The act of 1847 applies to places not of this character so far as the words "any city or place" can thus determine its application. But this act authorizes no specific arrangement of a local post except through subsidiary *post offices*. We have seen that such offices are not the only primary receptacles of letters at the internal stations of such a post. The act of 1851, which applies to every principal post town, whether a city or not, authorizes the establishment of a more extended and more complete system of local posts; and specifies the intended subjects of its arrangements in detail. We have seen that a monopoly by the government of letter carrying, at the sites of the local posts, is not an essential part of such a system.

The *"post routes,"* which this tenth section of the act of 1851 authorizes the Postmaster-General to establish in the respective towns or cities, are thus *local posts* to and from interior subordinate stations of the cities or towns. The definition of them is thus distinctly given in the act itself, which designates them as "post routes *within* the cities or towns." If any other meaning of the word *post routes* was intended by the draftsman of the act, the latent intention is not expressed so that effect can be given to it. The special *post routes* defined in the act are thus different from such mail routes, used by general posts, as are called, in a more general sense, *post routes*. Unless the word "post route" is isolated, and its context and relation dis-

regarded, this general meaning is not attributable to it, as it is used in the act.

But, at the Post-Office Department, the general meaning has been attributed to it, and it has been considered synonymous with *post roads*. The Postmaster-General issued, on 17th July, 1860, an order, to take effect on 1st August, 1860, declaring that, under the authority conferred by the act of 1851, the streets and other public avenues in certain designated parts of the city of Philadelphia "are established as *post roads*."

Post route and *post road* are not properly synonymous even when applicable to the carriage of a mail to and from appointed *postal* stations. A *post route,* in this general sense of the word, is the appointed course, or prescribed line of transportation of the mail. *Post roads* are, as we have seen, the highways, or public passages, on which it is transported in such a route. In the postal statutes the words post route and post road have, therefore, sometimes, distinguishable meanings. Their meanings may be practically different. (See 9 Harris, 127.) Nevertheless, the distinction has not always been observed. The words post route and post road have, sometimes, in the postal statutes, the same signification. Of the instances in which this occurs, one, in particular, will be mentioned. The act of 7th July, 1838, § 2, contains the words: "Each and every railroad within the limits of the United States which now is, or hereafter may be, made and completed, shall be a *post route;* and the Postmaster-General shall cause the mail to be transported thereon, provided he can have it done upon reasonable terms," etc.; and the act of 25th July, 1839, provides that he shall not, under this authority, allow more than a certain rate of compensation to railroad companies for the conveyance of the mails "upon their roads." Here the railroads were to be used in the routes of general posts, to and from appointed mail stations. If *such* mail routes had likewise been the subject of the 10th Section of the act of 1851, the word *post routes,* as used in it, might have been understood as having likewise the meaning of *post roads*. But the interior local posts of a town, and not such general posts, are the subject of this enactment.

We think, therefore, that the word *post routes* is used in it in a special sense in which it is not synonymous with *post roads,* and that the latter word is, consequently, misapplied in the Postmaster-General's order.

The bill, after setting out this order, complains that the defendants, without the authority of the United States, have set up, and now continue, a foot post and a horse post for the conveyance of letters and packets over the streets and other avenues in the parts of the city designated in the order, and are engaged in carrying and delivering such letters and packets for hire or compensation within these limits. The defendants, having demurred to the bill, admit the truth of these allegations. The argument for the United States is that the word post routes is, in the act of 1851, synonymous with post roads, that the Postmaster-General's order has, therefore, under the authority conferred by this act, made the streets in question post roads, and that, consequently, the act of 1827 prohibits the business of the defendants as that of carriers of letters and packets, by *post,* on such roads.

For the reasons which have been stated, we do not think that this interpretation of the act of 1851 can be sustained, or that the defendants are letter carriers by any *such* post as the act of 1827 prohibits. We think that the act of 1827 applies only to private posts on mail routes, and that the act of 1851 does not apply to *such* routes.

The bill further complains, and the demurrer admits, that the defendants, without the authority of the United States, have established and now continue in use a private *express,* for the conveyance or transportation, for hire or compensation, of letters and packets, other than newspapers, pamphlets, magazines, and periodicals, by regular trips, and at stated periods or intervals, from various *places within* the city of Philadelphia to various other places in the city *within and between* the postal districts of the city, over the streets, avenues, and other highways of the city. These allegations are copied from the 9th Section of the act of 1845, which has already been fully set forth. "Cities, towns, or other *places*" are mentioned in it.

Upon these words the argument for the United States is, that private expresses between "places" *within* the postal district of a city or other town are prohibited. We have seen, that the purpose which induced this legislation of 1845 was to prohibit private expresses on *mail routes*. A legislative enactment may, however, extend beyond, as it may fall short of, the purpose of its draftsman. In its interpretation the question to be decided is, not what he may have intended, but what its words mean. The enactment now in question preceded the acts of 1847 and 1851—the latter of which was the first authority for the establishment of an extended system of local posts in towns. But the prior act of 1841 had recognized the existence of branch post offices in cities, and the act of 1836 had authorized the reception of letters, in cities, for the respective post offices at designated places beyond their walls. Therefore, it is not impossible that Congress *might* have intended, in 1845, to prohibit private letter carrying within the limits of cities in which such internal posts are established. The question, consequently, may be considered as if the acts of 1847 and 1851 had preceded the act of 1845. This gives the utmost effect possible to the argument for the United States. But the argument, with all this aid, cannot be sustained. Where "cities, towns, or other *places*" are mentioned in the act, the word *places* designates mail stations which are neither cities nor towns. But no "places" other than mail stations are designated. Points within the limits of a mail station or postal district are not within the meaning of the word "places," as used in the act. In the statute already mentioned as having been quoted by Lord Mansfield, the word "place" in a similar context thus had the meaning of postal station. (Cowp. 188.) It has had a like meaning in other English and American acts of legislation, which have been mentioned. The word has had this precise meaning also in a judicial statement of the methods of giving notice of the dishonor of negotiable paper, personally or by post, "when the parties reside in the same city or *place*," and when the party to be served "resides in a different place or city." (11 Johns. 232.) In the act of Congress now in ques-

tion, the whole import of the context and the particular import and application of certain words which might be quoted and commented upon, thus define the word "places."

Thus, the business in which the defendants, as letter carriers, are engaged, is neither a private *post* within the meaning of the act of 1827, nor a private *express* within the act of 1845. The continuance of their business has a tendency to reduce the postal profits of the government or of its officials, by diminishing the number of letters received officially for local delivery. But this does not render the business unlawful, unless it is prohibited by the statutes which create or secure the postal monopoly of the government. The question is, not whether the business *could* constitutionally have been prevented or suppressed, but whether it *has* been legislatively prohibited. Though a local post, with subordinate stations, has been established in a post town, the statutes in force do not, in our opinion, prohibit the business of private letter carriers within the limits of the town.

Hitherto, the case has been considered as if the business of the defendants was confined to the carriage of such letters and packets as officials of the government could carry only on routes of the local post established within the limits of the Philadelphia mail station. If the business of the defendants, as described in the bill, were confined to the carriage of such letters, the demurrer, in its present form, would be sustained, and the bill dismissed. But, the bill contains other allegations. The Legislature of Pennsylvania, by an act of 2d February, 1854, incorporated newly the city of Philadelphia, with an enlargement of its boundaries, which now embrace the whole of the former county of Philadelphia, including extensive rural spaces beyond the limits of the former city and of the adjacent built districts. Within this enlarged municipality are many mail stations, every one of them having its post office, which is neither a sub nor a branch office. The built and rural districts of the city are intersected by streets which, so far as used between these offices by the general posts, are, of course, mail routes. The parts of the city designated in the Postmaster-

General's order include several of the mail stations and certain rural spaces. The bill, referring to the act of the state legislature incorporating the new city, names the several mail stations within its limits, and contains allegations importing that the defendants carry, not only such letters as have been specifically mentioned, but also letters which general posts of the government might carry on the streets in question, as established post roads between such mail stations. The defendants, if engaged in carrying letters or packets which might otherwise be thus carried by mail, violate the prohibition in the act of 1827. This prohibition is thus, however, independent altogether of the Postmaster-General's order of July, 1860, and of any act of Congress passed since 1827. So far as the bill may have this import, the demurrer cannot be sustained. A demurrer to so much of the bill as is not of this import would, however, have been sustainable. A demurrer thus framed would, perhaps, as may be inferred from the course of the argument, cover the whole intended subject of controversy. An application to amend the demurrer, or to take it off the file and demur again, may, therefore, be entertained. (See 2 Sch. & Lef. 207; 4 Madd. 192, 207, 208.) The case will stand over that the defendants may have an opportunity to make such an application.

DISTRICT COURT. MAY 4, 1861.

CRIMINAL LAW.

THE UNITED STATES *v.* CHARLES A. GREINER.

Shortly before the late revolutionary secession of Georgia, a volunteer military company in her service, by order of her governor, took possession of a fort within her limits, over which jurisdiction had been ceded by her to the United States, and garrisoned it until her ordinance of secession was promulgated, when, without having encountered any hostile resistance, they left it in the possession of her government. A member of this company, who had participated in the capture and detention of the fort, afterwards visited Pennsylvania at a period of threatened, if not actual, hostilities between the confederated States, of which Georgia was one, and the United States. He was arrested in Pennsylvania under a charge of treason.

1. It was held that if the courts of the United States for Georgia had been open, or if there had been a reasonable probability that they would soon be able to exercise their jurisdiction, the accused should, upon the charge of treason, have been committed, under the 33d Section of the judiciary act of 24th September, 1789, to stand his trial in the Circuit Court of the United States for the Southern District of Georgia, which court alone could have jurisdiction of the case. This act of Congress would then have required that a warrant should be seasonably issued for his removal to that district by the marshal. Such a warrant of removal was not asked for on behalf of the United States; and it was admitted that their courts for Georgia were not open, and were not likely to be able to exercise their jurisdiction within any definable period. Under such circumstances, the Constitution and laws of the United States gave no authority to commit the accused, or to require him to give bail to answer the charge of treason, at an uncertain future day in Georgia.

2. But though his immediate purpose in visiting Pennsylvania was apparently neither belligerent nor treasonable, the motive of his visit was, on account of his prior hostile relations to the United States, liable to just suspicion. He was required, therefore, to give security to keep the peace, and be of good behavior in all cases arising under the Constitution and laws of the United States.

3. When a body, large or small, of armed men is mustered in military array for a treasonable purpose, every step which any one of them takes, by marching or otherwise, in part execution of this purpose, is an overt act of treason in levying war.

4. Their occupation of a fortress, in order to take it from the dominion of a government to which they owe allegiance, is treason in every one of them concerned in the capture, or subsequent detention of the post, though they may encounter no hostile resistance in the capture or the detention.

5. A private soldier, or subordinate officer, serving under the command of a military superior, cannot excuse a treasonable act on the ground of compulsion, unless he was forced, under a personal fear of death, into the service, and quitted it as soon as he could.

6. This doctrine applies wherever, and so long as, the duty of allegiance to an existing government remains unimpaired. Though a revolution is impending, the allegiance continues to be due, so long, at least, as the courts of justice of the government are open to maintain its peace, and afford the citizen that protection which is the foundation of his duty of allegiance.

7. The accused owed a twofold allegiance, to the United States, and to the State of Georgia. His duty of allegiance to the United States was coextensive with the jurisdiction of their government, and was, to this extent, independent of, and paramount to, his duty of allegiance to the State. It continued to be thus paramount so long, at least, as the courts of the United States could exercise their jurisdiction within the state. Though these courts have been closed since the capture of the fort, there was, at its date, no such conflicting enforced allegiance to the state, as made him a public enemy of the United States, in contradistinction to a traitor.

8. The provision of the Constitution that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court, is inapplicable to preliminary hearings and commitments.

STATEMENT.

CHARLES A. GREINER was brought, under a charge of treason, before a commissioner of the United States. At the suggestion of the commissioner, the examination, on account of the importance of the case, was taken before the District Judge of the United States. At the close of the examination, the United States District Attorney, GEORGE A. COFFEY, Esq., moved that the defendant be committed or held for trial at the next actual session of the U. S. Circuit Court for the Southern District of Georgia. The District Attorney admitted that the United States Courts did not now sit, nor their process actually run, in Georgia; but he argued at length that the judge was bound to presume that those courts would sit in Georgia within a reasonable period; and that this was at present a legal presumption, in view of the avowed purpose of the government to re-establish its authority there. After hearing the evidence, the learned District Judge delivered the following opinion:

CADWALADER, J.

The questions in this case are more important than difficult. On the 2d of January last, an artillery company of the State of Georgia, mustered in military array, took Fort Pulaski, in that state, from the possession of the United States, without encountering any forcible resistance. They garrisoned the post for some time, and left it in the possession of the government of the state. The accused, a native of Philadelphia, where he has many connections, resides in Georgia. He was a member of this artillery company when it occupied the fort, and, for aught that appears, may still be one of its members. He was not its commander. Whether he had any rank in it, or was only a private soldier, does not appear, and is, I think, unimportant. He is charged with treason in levying war against the United States. The overt act alleged is that he participated,

as one of this military company, in the capture of the fort, and in its detention until it was handed over to the permanent occupation of the authorities of the state.

The primary question is whether, if his guilt has been sufficiently proved, I can commit him for trial, detain him in custody, or hold him to bail to answer the charge. The objection to my doing so is, that the offence was committed in the State of Georgia, where a court of the United States cannot, at present, be held, and where, as the District Attorney admits, a *speedy* trial cannot be had. The truth of this admission is of public notoriety.

The Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to a *speedy* trial by a jury of the *State and district* wherein the crime shall have been committed. The only statute which, if the courts of the United States for the State of Georgia were open, would authorize me to do more than hold this party to security of the peace and for good behavior, is the 33d Section of the judiciary act of the 24th September, 1789. That section, after authorizing commitments, etc., for trial before any court of the United States having "cognizance of the offence," enacts that if the commitment is in a district other than that in which the offence is to be tried, it shall be the duty of the judge of the district where the delinquent is imprisoned, *seasonably* to issue, and of the marshal of the same district to execute, a warrant for the removal of the offender to the district in which the trial is to be had. The District Attorney of the United States does not ask me to issue such a warrant for this party's removal to Georgia for trial. Therefore I can do nothing under this act of Congress. It does not authorize me to detain him in custody to abide the ultimate result of possible future hostilities in Georgia, or to hold him to bail for trial in a court there, of which the sessions have been interrupted, and are indefinitely postponed.

The next question is, whether I should, under the act of 16th July, 1798, require this party to give security to keep the peace and be of good behavior in all cases arising under the Consti-

tution and laws of the United States. His counsel suggests that he was acting under the compulsion of military orders from the Governor of Georgia, which the law of the State bound him to obey; that the fort, when taken, was not so garrisoned or occupied that an array of military force was required for its capture; that it was taken without actual resistance on the part of the person or persons who had occupied it for the United States; that the period was one at which motives of hostility against the United States are not imputable to the Governor of Georgia, or to those who acted under his orders; that the capture and subsequent detention of the fort may have been to prevent its riotous occupation or destruction by a mob; and that the accused party, therefore, was not guilty of levying war against the United States, or of any other offence against their laws. If these views are incorrect, if either the capture or the detention of the post was treasonable, there can, I think, be no dispute that security of the peace and for good behavior should be required.

In explanation of Mr. Greiner's visit to Philadelphia, it has been shown that his wife and child have been here from the commencement of last winter, at a boarding house, at which he arrived a few days ago, and that he has lived there openly, with them, from that time until his arrest on Tuesday last. The district attorney states that he has made sufficient inquiry, and asks no time for further inquiry, into the circumstances of this visit, or as to occurrences during Mr. Greiner's sojourn here. He appears, nevertheless, to have declared his intention to return to Georgia, where he is engaged, as he states, in agricultural pursuits. However favorably this case may thus, in one aspect of it, have been presented, there is a different aspect in which it ought also to be considered. The crisis is one of impending or threatened, if not of actual hostilities, in which different sections of the country are, or may soon be, arrayed in arms against each other. Mitigating circumstances, which might induce the pardon of an act of treason, cannot so qualify the offence as to alter its legal definition. That a person who has participated in a treasonable aggression upon a fortress of

the United States should, at such a period as this, pass and repass the frontier of the seceded States without being justly liable to the most vigilant suspicion, cannot be supposed possible. The reasons are obvious. Should he, for example, transmit intelligence to Georgia concerning military preparations here, or take part, however indirectly, in procuring supplies or other assistance for those in arms against the United States, he would commit an act of treason for which he would be triable here. Those who stand in his relation to two hostile sections of a country are, unfortunately, the persons most frequently concerned in such criminal enterprises. In their punishment, public policy may sometimes require a severity sadly disproportionate to the actual measure of guilt in their intentions. I have, therefore, during the two days of the hearing, considered carefully the question whether it would be my duty, if the courts of the United States for Georgia were open, to commit him under the charge of treason, and issue a warrant for his removal thither for trial. If this question is answered affirmatively, he should not be discharged without giving cautionary security under the act of 1798. I have heard his counsel fully upon this point. But I have declined hearing the District Attorney upon it, because I have no doubt whatever that sufficient probable cause to support a prosecution for treason has been shown.

Any such aggravated breach of the *duty of allegiance* to an *existing* government as may tend to its total or partial subversion is, in a general sense, within the political definition of treason. Under the government of the United States, the legal catalogue of specific offences embraced in this definition is, however, limited by the constitutional provision that "treason against the United States shall consist *only* in levying war against them, or in adhering to their enemies, giving them aid and comfort." Under other governments, including that of England, the catalogue of treasons is more extended. But the two species of treason mentioned in the Constitution are described in it in language borrowed from that of the English statute of treasons. The phrase "levying war," as used in the Con-

stitution, is therefore understood and applied in the United States in the same sense in which it had been used in England. Chief Justice Marshall consulted Coke, and Hale, and Foster, in order to ascertain the constitutional meaning of this phrase. (2 Burr's Tr. 402, 409; 4 Cranch, 471, 472, 477.) According to these writers, the occupation of a fortress by a body of men in military array, in order to detain it against a government to which allegiance is due, is treason on the part of all concerned, either in the occupation or in the detention of the post.

The words of Sir E. Coke are: "If any, with strength and weapons invasive and defensive, doth hold and defend a castle or fort against the king and his power, this is levying of war against the king." (3 Inst. 10.) Sir M. Hale has copied this language almost precisely. (1 Pl. Cor. 146.) Sir M. Foster says: "Holding a castle or fort against the king or his forces, if actual force be used in order to keep possession, is levying war. But a bare detainer, as, suppose, by shutting the gates against the king or his forces, without any other force from within, Lord Hale conceiveth will not amount to treason. But, if this be done in confederacy with enemies or rebels, that circumstance will make it treason, in the one case under the clause of adhering to the king's enemies—in the other, under that of levying war." (Disc. 1, ch. II, s. 11.) In the year 1776, the powers of government under the British East India Company were vested, at Fort St. George, in the President and Council of Madras. Neither the President nor the Council could rightfully administer the local government independently of one another. The President adopted certain arbitrary and illegal measures for suspending a majority of the Council from participation in its proceedings. They, in turn, assuming the administration of the government, deposed and imprisoned him, and took and detained possession of the fort. As their intent, in this usurpation of power, was only to substitute themselves for the regular local government, and exercise its functions in subordination to the East India Company, they were convicted of a misdemeanor only. But the Court of King's Bench were of opinion that "if the assumption of the govern-

ment, and taking possession of the fort, had been with an intent to *draw it from the dominion of* the crown of Great Britain, it would have been high treason." (21 St. Tr. 1283; see 3 C. Rob. 31.)

The present case is much more simple. In the fort in question there was, in legal strictness, no more division of power, or deduction from the jurisdiction of the United States, than there is in the District of Columbia. (6 Wheaton, 426, 427; 12 Peters, 619.) The jurisdiction of the United States was, under the Constitution, as exclusive and independent of state control as if the land on which the fort was erected, and which had been ceded by the State of Georgia, had not been within her limits. If, indeed, the purpose of taking possession of it, as a defenceless post, had been to keep it for the United States, the act, whether excusable or not, would not have been treasonable. But the crisis was one of impending revolution or insurrection. The threat of revolutionary measures had already proceeded from the government of the State. The detention of this post for her government by this hostile force was, therefore, I think, levying war against the United States. If the treasonable intent had at first been legally doubtful, the subsequent unqualified surrender of the fortress to the State would, if the doubt were not removed by it, render the case a proper one, at all events, for the consideration of a jury.

That no hostile resistance was opposed by the former occupants of the fort is, I think, unimportant. When a body, large or small, of armed men is mustered in military array for a treasonable purpose, every step which any one of them takes in part execution of this purpose is an overt act of levying war. This is true, though not a warlike blow may have been struck. The marching of such a corps with such a purpose, in the direction in which such a blow might be struck, is levying war upon land. The mere cruising of an armed vessel with a hostile purpose is levying maritime war, though the cruiser may not encounter a single vessel. This doctrine, which is conceded throughout the opinion of Chief Justice Marshall in Burr's Case, had been established previously by English authorities.

(1 Hale P. C. 152; Foster, 218; 2 Salk, 635; 13 How. St. Tr. 485; 2 Burr's Tr. 408; 4 Cranch, 476.)

The allegation that the accused was, or may have been, acting under the orders of the Governor of Georgia, or of some other commanding or superior officer, is likewise unimportant. In the cases of the Highlanders of Scotland, whose clans were, without any independent will of their own, mustered by their chiefs into the military service of Charles Edward when he invaded England in 1745, the legal character of such a defence was fully considered. The previous doctrine then recognized, and re-established, was that the fear of having houses burned, or goods spoiled, was no excuse, in the eye of the law, for joining and marching with rebels; that the only force which excuses on the ground of compulsion is force upon the person and present fear of death, which force and fear must continue during all the time of military service with the rebels, and that it is incumbent in such a case on every man who makes force his defence, to show an *actual* force, and that he quitted the service as soon as he could. (Foster, 14; 18 St. Tr. 391, and see Foster Disc. 1, ch. 2, s. 8.) If any other excuse were allowable, it would, in the language of Sir M. Foster, "be in the power of any leader in a rebellion to indemnify all his followers."

This doctrine is applicable wherever and so long as the duty of allegiance to an existing government remains unimpaired. When this fort was captured, the accused, in the language of the Supreme Court, owed "allegiance to two sovereigns," the United States and the State of Georgia. (See 14 How. 20.) The duty of allegiance to the United States was co-extensive with the Constitutional jurisdiction of their government, and was, to this extent, independent of, and paramount to, any duty of allegiance to the state. (6 Wheaton, 381, and 21 Howard, 517.) His duty of allegiance to the United States continued to be thus paramount so long, at least, as their government was able to maintain its peace through its own courts of justice in Georgia, and thus extend, there, to the citizen that protection which affords him security in his allegiance, and

is the foundation of his duty of allegiance. Though the subsequent occurrences which have closed these courts in Georgia may have rendered the continuance of such protection within her limits impossible at this time, we know that a different state of things existed at the time of the hostile occupation of the fort. The revolutionary secession of the State, though threatened, had not then been consummated. This party's duty of allegiance to the United States, therefore, could not then be affected by any conflicting enforced allegiance to the State. He could not then, as a citizen of Georgia, pretend to be a public enemy of the United States in any sense of the word "enemy," which distinguishes its legal meaning from that of traitor. Future cases may, perhaps, require the definition of more precise distinctions, and possible differences, under this head. The present case is, in my opinion, one of no difficulty, so far as the question of probable cause for the prosecution is concerned.

The evidence for the prosecution has consisted of the direct testimony of one witness to the alleged overt act, and of admissions made voluntarily by the accused party since his arrest. The Constitution provides that no person shall be *convicted* of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. The admissions here proved were not such confessions, and upon the trial of an indictment, would not, in connection with the testimony of the single witness to the overt act, suffice to warrant a conviction. But the provision of the Constitution, and the language of the first section of the act of April 30, 1790, on the subject, apply only to the trial of indictments, and are inapplicable to proceedings before grand juries, or to preliminary investigations like the present.

This appears to have been the opinion of Chief Justice Marshall (1 Burr's Tr. 196), and likewise of my judicial predecessor in this district. (2 Wall Jr. 138.) Judge Iredell had, indeed, been previously of a different opinion. (1 Whart. St. Tr. 480.) His impression had probably been derived from the opinions which, under the statutes 1 Ed. 6, c. 12, s. 22; 5

Ed. 6, c. 11, s. 11, and 7 W. 3, c. 3, had prevailed in England. (See Fenwick's Case, 13 St. Tr. 537, and 26 How. 731.) As the point has never been directly decided in the United States, it may not be amiss to mention a difference between the language of the English statutes and the words of the Constitution. Those statutes enacted that no person should be *indicted* or convicted of treason, unless, etc. The Constitution, omitting the word "indicted," uses the single word "convicted." This difference in language, to which the attention of Chief Justice Marshall was doubtless directed, though he does not mention it, seems to be decisive of the question. The intention of the framers of the Constitution must have been to restrain the application of the prescribed rule of evidence to the trial of the indictment. A person should not, however, be indicted or imprisoned under a charge of treason when there is no rational probability that the charge, if true, can be proved by two witnesses on the future trial.

In the present case, I require security of the peace and for good behavior.

The above opinion having been read, the District Attorney made a formal application to the effect of a suggestion which he had made in his previous argument. The suggestion had been that, although the accused party could not be sent at this time to Georgia for trial, he might be committed here for trial in the proper Court of the United States for Georgia when it should hereafter be open, and that he might, in the meantime, be detained here in custody, or admitted to bail to answer the charge hereafter in Georgia. The formal application was a motion that he be held to bail, or committed for trial, "at the next *actual* term or session of the Circuit Court of the United States for the Southern District of Georgia." After the argument of this motion, the JUDGE retained his former opinion, saying:

I cannot commit this party for trial under any other jurisdiction than that conferred by the 33d Section of the act of 1789. Under this act I can commit him to no other custody

than that of the marshal. I cannot, under the act, commit him to the marshal's custody for any purpose other than that of removal to Georgia. If it appeared probable that the proper court there would be open within a definite reasonable period, the necessity of the case might authorize a limited corresponding delay, either in the issuing, or the executing, of a warrant of removal; perhaps in executing it, rather than in issuing it. But no such probability appears. Most of the cases which have been cited as to putting off trials for criminal offences, and keeping prisoners under arrest, are precedents to regulate the practice of courts to which the prisoners are committed for trial, and not the practice of magistrates ordering the removal of prisoners to proper places for trial. The judiciary system of the United States is founded upon the Constitution. The warrant of removal must be issued *seasonably* under the judiciary act, with a view to a probable *speedy* trial under the Constitution, in the proper district. The District Attorney still declares that he does not wish that a warrant of removal be issued. The order of commitment, as he asks it, without such a warrant, would be a dangerous precedent. It would sanction the imprisonment, for indefinitely long periods, of persons at great distances from their homes and their friends, where bail might not be found. Under charges for capital offences bail might be refused as well at the time of commitment, as also afterwards on habeas corpus.

Though I have no doubt myself upon the point, yet as my refusal of the application will not be liable to revision, I am desirous of consulting on the subject with Judge Grier, who, I am confident, will, at my request, sit with me, and hear the District Attorney's arguments repeated.

Judge Grier, after having heard these arguments, remarked that his opinion coincided on all the points of the case, and particularly the point upon which it had been asked, with the District Judge's opinion, which he had previously read.

The District Judge then said: The decision upon this hearing, though Judge Grier kindly sits with me, must be ex-

clusively my own. His concurrence in my former opinion, to which I adhere, confirms me in a satisfactory belief of its correctness. The District Attorney's motion is not granted.

Mr. Greiner, upon entering with two sureties into a recognizance in $10,000 to keep the peace and be of good behavior in all cases arising under the Constitution and laws of the United States, was discharged from custody.

CIRCUIT COURT. May 23, 1861.

EQUITY.

KNAPP *v.* THE CHESTER VALLEY RAILROAD COMPANY.

Under authority of an act of the legislature of Pennsylvania of 24th February, 1852, a mortgage was made for the security of railroad bonds to trustees named by the bondholders. The act provided that a sale *under the mortgage* should pass the road property and franchises. The mortgage stipulated, *inter alia*. 1. That if the company should fail to pay the principal or interest, the trustees might take possession of the road, receive the income and after defraying charges and expenses apply the net avails in payment of principal and interest due. 2. That after the principal should fall due the trustees might, on request of the bondholders, cause the premises to be sold at auction after prescribed notices. The company having defaulted on its interest payments the first stipulation was carried into effect. Afterwards and before the maturity of the bonds, the trustees on behalf of the bondholders sought in this proceeding the aid of a Court of Equity to obtain foreclosure on the mortgage by reason of the failure to pay interest. *Held,*

1. That in the courts of Pennsylvania there could be no foreclosure of this mortgage. The only proceedings in that State on a mortgage and under which a judgment can be obtained that the mortgaged premises be sold, are given by the act of 1705. There can be no proceeding under this act until after the expiration of twelve months from the time when the principal of the bonds fall due.

2. The method of obtaining an earlier proceeding in that State by inserting a provision in the mortgage that upon default of payment of interest the principal should be considered due, not having been resorted to in this case, it is to be inferred that it was opposed to the views of the parties.

3. In the absence of legislative provision, a railroad and its franchises cannot be sold under an execution, or voluntarily sold, or effectually mortgaged.

4. Had the act of 1852 *(supra)* simply authorized the mortgage to be made as a security for the principal and interest of the bonds, the road and its franchises would according to a doctrine peculiar to Pennsylvania have been liable to an execution under a judgment at law upon a coupon for interest in arrear. But the terms of the act of 1825, limiting the remedy to a "sale under and by virtue of the mortgage" excludes the application of this doctrine in the absence of a proviso on the mortgage to sell in default of interest.

5. On the equity side of the Circuit Court, remedies are not regulated as on its law side, by the practice in the courts of Pennsylvania. In a proper case it may extinguish an equity of redemption by a foreclosure, and its practice in such a case would, under the 90th of the rules of 1842, be regulated conformably to the practice of the English Chancery at that period.

6. Where, upon a consideration of the whole contract, the circumstances of the road, and the relations of the parties, it appears that the equity of redemption was intended to be guarded against extinction at any period before the principal becomes due, a Court of Equity will not declare it forfeited.

7. It might, where the state of facts justified it, intervene to secure the subject of the security from irretrievable ruin, on the footing of necessity.

BILL IN EQUITY for foreclosure of mortgage.

STATEMENT OF THE CASE.

The nature of the mortgage and its provisions, with the act of Assembly under which it was created, are fully set out in the opinion of the court.

The bill was filed by the trustees named in the mortgage. After setting forth the insolvency of the corporation defendants, and their want of means and credit, it averred that the mortgage conveyed the mortgaged property to the complainants to secure payment of interest as well as principal at certain specified days and times; and that these having passed without payment thereof, the legal estate of the corporation in the mortgaged property and franchises had been forfeited and vested absolutely in the trustees, and that there remained in the corporation defendants no more than an equity of redemption, as to which the complainants had an immediate right of foreclosure and sale and to have the proceeds of sale applied to the payment of the overdue debts of the company to the trustees, and their cestuis que trust, the bondholders. And

further that there was no adequate remedy at law to obtain this right, the franchises not being separable from the road which was valueless without them, and they being incapable of sale under any proceeding at law.

The bill prayed for an ascertainment of the amount of interest due; that the court should declare any estate or title of the corporation defendants in the mortgaged premises to be forfeited by reason of the nonperformance of their covenants to pay interest, and that on the payment thereof by the defendants at a day to be named that the mortgaged property and franchises should be sold under the direction of the court at such time and in such manner as to the court should seem meet and for the distribution of the proceeds under direction of the court among the parties entitled under the mortgage.

The answer averred and the proofs established that the condition of the road was not one of hopeless, permanent insolvency; that its earnings, though inadequate, were still considerable, and that there was a reasonable prospect that in time it might surmount its difficulties and be enabled to meet its engagements. It denied the right of the trustees to proceed in the manner claimed in the bill altogether, and averred that under the mortgage no sale of the mortgaged premises could be enforced at their instance until the principal of the bonds became due and unpaid.

No part of the principal was due before May 1st, 1872.

Accompanying the answer was a plea which set forth a decision of the Supreme Court of Pennsylvania in a suit brought by Bradley, one of the bondholders, against the same corporation (defendants) with whom were joined the trustees who are now complainants in this case. It was a suit in equity to compel the trustees to sell under the mortgage by reason of the company's default of payment of interest. This decision and its effect upon the present case are considered by Judge Cadwalader.

Richard C. McMurtrie and *St. George T. Campbell*, for the complainants.

Charles Gilpin, for the defendants.

CADWALADER, J.

The legislature of Pennsylvania, by an act of 24th February, 1852, enabled The Chester Valley Railroad Company to raise money for the completion and equipment of their road and works by issuing their bonds in sums of not less than $100 to an amount not exceeding $500,000, with interest at 7 per cent. per annum, payable half yearly, redeemable in the year 1870, and convertible, at the bondholders' option, into a "preferred 8 per cent. stock" of the company; and enabled them to convey their road, property and franchises acquired, or to be acquired, to trustees of their own appointment on mortgage to secure the payment of the bonds, and accruing interest; and enacted that a sale, under the mortgage should pass the road, property and franchises.

The company issued their bonds for the full amount thus authorized with coupons for the interest; and, for the security of the bondholders, executed a mortgage to trustees, in the form of a conveyance of the railroad and all their franchises and property acquired or thereafter acquired, defeasible on payment of the bonds at maturity, and of the interest in the meantime, with a provision that, if the company should fail to pay the principal or interest, the trustees might take possession of the road, receive the income, and after defraying charges and expenses, apply the net avails in payment of the principal and interest due; and another provision of which the effect, as determined by the Supreme Court of the State, was, that, after the principal should fall due, the trustees might, on request of bondholders, cause the premises to be sold at auction after prescribed notices. In the language of that court the stipulated remedy for non-payment of the *interest* was to be "possession of the road and receipt of the profits. No power of sale was conferred for such a cause" (12 Casey, 152). The net profits of the road have been applied in reduction of the accumulating interest, which is, for several years, in arrears. The trustees are, under a decree of this court in possession of the road, and in the receipt of its accruing income. The net annual avails do not, in amount, nearly equal the annual in-

terest. But there is no certainty that the profits may not be greatly increased hereafter, before the principal shall have become due.

The present question is, whether, until the principal shall have become due, the bondholders, or the trustees on their behalf, can obtain under the name of a foreclosure, a decree of this court for the extinction of the company's equity of redemption, either through a sale of the road and franchises, or otherwise.

In the courts of Pennsylvania there could be no foreclosure of this mortgage. In those courts, the only proceeding on a mortgage is by scire facias, under the statute of 1705, to obtain a judgment at law that the mortgaged premises be sold for the payment of the mortgage debt. There could be no proceeding under this act until after the expiration of twelve months from the time at which the principal of the bonds will fall due. The proper method of authorizing an earlier proceeding under the act would have been to insert in the mortgage a provision that whenever the interest should be, for a designated period, in arrear, the principal debt should, for the purpose of sustaining such a proceeding, be considered as having been due for a year. The practice of conveyancing in the State when a long credit is given for a mortgage debt is to insert such a provision. If not opposed to the views of the parties in this case, it would probably have been inserted in the mortgage in question.

The chief subjects of the mortgage were the railroad and franchises. These could not, without legislative authorization, have been sold under an execution, or voluntarily sold, or effectually mortgaged. Had the legislature, by the act of 1852, simply authorized the mortgage to be made as a security for the principal and interest of these bonds, the road and franchises would, according to a doctrine peculiar to Pennsylvania, have been liable to execution under a judgment at law upon a coupon for interest in arrear on any one of the bonds. A sale, under such an execution, would, according to this peculiar doctrine, have vested the road and franchises in the purchaser

absolutely. (1 J. P. Jones, 292.) But the specific purpose of the act of 1852 is defined in it so as impliedly to exclude the application of the doctrine. This law enacts that "a sale *under and by virtue of the mortgage* so made and executed shall pass the said road property and franchises to the purchaser or purchasers," etc. Though the interest is a part of the mortgage debt, a sale under an execution upon a judgment for such interest is not, in the language of Pennsylvania lawyers, a sale *under the mortgage*. The only sale to which the designation seems to be applicable is either one under an execution in a proceeding upon the act of 1705, or a conveyance under a power to sell contained in the mortgage. This being so, if we keep in mind that a legislative enactment was required in order to make the road and franchises liable at all to sale under an execution, the conclusion which seems to follow is that the act of 1852 has not made them saleable otherwise than in one of these modes.

We have seen that, under a proceeding upon the act of 1705, there can be no sale of them until after the maturity of the bonds.

The act of 1852, would, as we think, have enabled the company to insert in this mortgage an effectual power to sell on default in the payment of either interest or principal. A modern English mortgage, with such a power usually contains a proviso that the insertion of the power shall not prejudice the right of the mortgagee to foreclose. (22 L. J. Ch. 247; 15 Eng. L. & Eq. 454; Cooke, ch. 6.) In such a mortgage, the sale under the power and the foreclosure are optional alternative modes by which the creditor may enforce the security. In the absence of such a proviso, unless a statute regulates the practice, the ordinary method of proceeding in chancery on a mortgage containing a power of sale must be under the equitable jurisdiction to enforce and regulate the execution of the power. But English chancellors, before, and since the late English statute, have, in proceedings upon mortgages containing the power of sale without the proviso, decreed foreclosures in the ancient mode. This

has been done where the property mortgaged has been valueless in the market as the subject of a sale, or where such foreclosure has, for any other apparent reason, been more beneficial for *all* parties concerned than a sale. A further investigation of the cases in which this may be done in England, is rendered unnecessary by the decision of the Supreme Court of the State that the mortgage in question contains no power to sell for a default in the payment of interest.

So far as the railroad and franchises are concerned the possession of them, and receipt of the profits by the mortgagees is thus, as it would seem, the only remedy upon this mortgage, unless the present application to decree a foreclosure can be sustained. On the equity side of this court, remedies are not regulated, as on its law side, by the practice in the courts of Pennsylvania.

This court may, in a proper case extinguish an equity of redemption by a foreclosure. The practice in such a case, would, under the 90th of the rules of 1842, be regulated here conformably to the practice in the English chancery at that period. The argument on behalf of the complainants has been that upon a mortgage like this, containing a power to *take possession* upon default in the payment of *either interest or principal*, and a power to *sell* only on default in the payment of the *principal*, an English chancellor would entertain a bill to foreclose for non-payment of interest. However this might be, we think that the parties to the mortgage in question have by the terms and meaning of their contract, precluded the necessity for ascertaining the particular course of English chancery practice in such a case.

The 90th rule of practice was intended for the mere administration of equitable *remedies*. They must be administered under it so as not in any manner to impair the validity of *rights*. For this, the rule itself provides. Its words make it enforceable so far only as it may reasonably be applied consistently with the local circumstances and local convenience of the district. Though, in this court, the remedy is not regulated conformably to any jurisdiction or practice

of the State courts, we may, in construing this mortgage, be able to ascertain the intention of the parties by referring to the laws of the State, because the parties must be supposed to have had these laws principally in view when the instrument was prepared. In thus approaching the interpretation of their contract, in order to ascertain their mutual rights, we may remark also that, so far as it has been interpreted already by the Supreme Court of the State, we have a guide which we may safely follow.

There was, in this case, a great reason to induce the mortgage debtors to withhold from the bondholders the right of extinguishing precipitately the equity of redemption. The road was not made, much less equipped. The company's finances were already embarrassed. Unless a sinking fund of reserved capital should be set apart for payment of the earlier coupons, their punctual payment cannot have been certain. It was perhaps, in the actual case, not even probable. The financial embarrassments of the company cannot have been unknown to the speculators who took the bonds. The bondholders may be thus called speculators because they might lawfully have taken the bonds, as they probably did, at such a discount from their nominal principal as to increase greatly the high rate of interest which was payable on their face. It might therefore have been thought that the speculation in them would be unreasonably favored if there was to be any other security on the road and franchises, before the expiration of the credit for the principal than a right of possession and receipt of the accruing profits. The question is whether enough does not appear in the case to show an intention of the parties, at the date of the mortgage, that the equity of redemption should not be extinguishable at the expiration we will say, of six months, at the option of any holder of an unpaid coupon. To ascertain this intention, we may combine all the positive and negative circumstances of the transaction in a single view of their effect. The insertion in the mortgage of the power to take possession upon default in the payment of either interest or principal, with a

power to sell only upon default in the payment of principal, and the omission of any provision to authorize the issuing of a scire facias on default in the payment of interest although the act of 1852 had specified a sale *under the mortgage* as the means of divesting the company's title, are circumstances to show that so far as the law of remedies in courts of Pennsylvania, and so far as the practice of conveyancing in the State, might be concerned, the equity of redemption was at every point guarded against liability to extinction at any period before the principal should fall due. If we recur to the probable reasons, or motives, for thus guarding it, the circumstances recapitulated show that possession of the road, with receipt of the profits, is the only remedy which, so long as it may answer the purpose of a security, however inadequate, can be enforced at an earlier period, without so violating the manifest intention of the parties as to involve an infraction of right.

If the road, in the hands of the bondholders, or their trustees, had been a mere *caput mortuum*, absolutely unproductive and useless, the court might, perhaps, for the benefit of all parties, have intervened, on the footing of necessity, to extricate, if possible, the subject of the security from utter irretrievable ruin. But no such equitable administration of the law of necessity is required in this case. There is not even a relative necessity for the exercise of such a jurisdiction. The net income of the road, has, it is true, fallen so far short of what may have been expected, that the bondholders are disappointed creditors. They have indeed been sadly disappointed. But the road is not altogether valueless, or absolutely unproductive; and they are now in possession, as we think, of the specific security for which they contracted.

On the whole therefore, we do not think that a sale or foreclosure should be decreed.

The following orders had previously been made in this case:

The report of the commissioner to whom this matter was referred, to report as to the distribution of the fund in

court, arising from the rental of the road to the Reading Railroad Company, having been filed, the following orders were yesterday entered by the court:

And now, 6th December, 1860, the court having considered the commissioner's report filed on the 5th December instant, and it appearing that the sum of $915.18 whereof no distribution, immediate or prospective, has been reported, will more than suffice to pay the demands of the respective exceptants, Abbott & Co., and O'Neill, if the same should hereafter be allowed, it is considered, adjudged and decreed that the respective amounts, together $25,998, reported as payable to the several parties named in the said report, be paid accordingly out of the fund in court on the production and surrender of the coupons by the respective holders of the same.

It is ordered that where other coupons, payable out of the fund in court, have not been as yet presented, the said commissioner, so far as may be practicable, cause actual notice of the pending reference to be given to such parties as on any former distribution have received payment of said coupons for interest on the same respective bonds, and that he report from time to time as the respective results of unfinished business of the reference to him shall have been ascertained, or as occasion may otherwise require.

It is further ordered that he report specially from time to time, as parties entitled to payment out of the fund in court may respectively produce their coupons to be surrendered on the payment of the same.

It is ordered that the several items of expenses whereof the particulars, as specified in the said report, amounting to the two sums of $1,076.84 and $80 be paid out of the fund in court.

The remaining subjects of the reference and report are reserved for future consideration, with liberty to the respective parties interested to move the court.

DISTRICT COURT. JUNE 1, 1861.

GRAND JURIES.

A. J. ANTELO'S CASE.

1. A principal purpose of the act of Congress of 16th August, 1856, conferring upon the courts power to discharge grand juries, is to limit disproportionate expense.

2. A presentment should be definite in form, with specifications.

PRESENTMENT OF GRAND JURY.

A paper was handed in by the foreman of the grand jury, presenting the name of A. J. Antelo, for a while engaged by the Quartermaster-General's Department, for furnishing worthless supplies to the government at exorbitant prices.

The grand jury further stated in their paper that they were ready now to furnish the United States District Attorney with the names of the witnesses, and all other information that he should require.

Judge Cadwalader took the paper and said it would be acted upon by the District Attorney at once.

It was desirable, if further presentments were to be made, that they should be made in a more definite form; in other words, should be accompanied by specifications, so that the District Attorney could act upon them without any original investigations.

The judge further alluded to the length of time they had been in session, and the great expense thus entailed upon the government, and expressed a hope that they would speedily conclude their labors.

The foreman stated that there was important unfinished business before them.

The judge then stated that he would like to hear from them again either in the course of the day or on Monday.

The grand jury then retired, and in the afternoon came into court and presented the following paper, which was read:

To the Hon. Judge Cadwalader, Judge of the District Court of the United States for the Eastern District of Pennsylvania:

The Grand Jury, in the conscientious discharge of their duties, have been in the diligent pursuit of an inquiry touching the interests of the United States Government, and of the United States soldiers; they are still in its prosecution, and have yet a large number of witnesses to examine, and they have been conducting it as expeditiously as possible, and have sought the advice and instruction of the District Attorney in the prosecution of their labors, and have, as hurriedly as possible, consistent with the public interest, pushed forward their investigations; but they have been so frequently admonished by the Court of the "enormous" expense attending their sittings, and the anxiety of the Court to discharge this body is so manifest, that our own self-respect compels us to ask the Court to relieve us from further attendance.

At the same time, we would respectfully present, that a further expense than that arising alone from the sittings of this jury, is absolutely necessary to provide decent accommodation for the officers of the Court, and future Grand Juries; and also, that it is only reasonable to expect from the Court a certain amount of respect towards Grand Juries, which has thus far not been accorded us.

In response the Judge read the following:

Gentlemen of the Grand Jury:—An act of Congress passed on the 16th of August, 1856, gives to the Court the power to discharge the Grand Jury whenever a further continuance of their session will not in the opinion of the Court subserve the public interest.

One of the purposes of this enactment, if not its principal purpose, is understood to have been to prevent the continuance of the sessions of the Grand Juries from being attended with an expense disproportionate to the public benefit of their investigations. The very limited amount of business of the Federal Courts usually requiring the attention of Grand Juries, seemed to render such an enactment necessary.

The power of the Court under this head conferred by the act of Congress, is attended with a corresponding duty requiring the exercise of the power in certain cases. I have always hoped that my duty would never require me to exercise it at any time at which a Grand Jury might desire to continue their sessions. But the great expenditure incurred in the Courts of the United States for the attendance of Jurors, has induced me ordinarily to mention the subject to Grand Juries in such language as might invite their attention to its importance.

In doing so to the present Grand Jury, I fear that I have been misunderstood. I certainly have been misunderstood by any Grand Juror who may have supposed that I could have had any other feeling for the Grand Jury than that of profound respect.

The business laid before this Grand Jury by the District Attorney on behalf of the United States, has been of limited extent, and cannot have occupied much of their time. The time of the Grand Jury has, however, been occupied in an investigation, as to which I have given them all the aid in my power.

The particular presentment, which as yet has been the single result of their investigations, seemed to the Court wanting in precision, if not in specification.

In stating this to the Grand Jury no disrespect was felt or intended, and I cannot believe that any was exhibited.

The paper which the Grand Jury have since presented apprises the Court that an important investigation is still pending. The Court respectfully suggests to the Grand Jury that this investigation should be prosecuted by them with the continued attention due to its importance. The Court will make no order for its discharge under the circumstances which are stated in this paper.

Recurring to the particular presentment considered wanting in decision, the Grand Jury will understand, that as it contains an accusation of a crime not in the form of an indictment, in a case in which there had not been a previous

hearing before a committing magistrate, the Court intended merely to intimate an inability to take any other order in the business than to refer it to the District Attorney for consideration.

DISTRICT COURT. JUNE 26, 1861.

CRIMINAL LAW.

THE UNITED STATES *v.* DANIEL AND WILLIAM B. TARR.

1. If persons are engaged in making counterfeit coin in the house of one who, knowing their guilty purpose, has procured, or facilitated its execution by harboring them in the house, he is, under the 20th Section of the act of Congress of 3d March, 1825, guilty of *assisting* in making such coin.

2. On the trial of a person indicted for this offence, after proof that counterfeit pieces of coin, and certain machines, implements and materials were found in his house in places where they probably could not have been unseen by him, a detective police officer testified that his observation in many other cases in which he had arrested persons in places where counterfeit coins had been found, enabled him to know the purpose to which such machines, implements and materials could be applied. The witness was rightly allowed to testify that they could all be used in making such coin, and that although each one separately might be otherwise used, there was, in his belief, no other use to which they could collectively be applied.

3. The house had been demised to the defendant for a month, and afterwards from month to month, at a certain monthly rent, payable in advance. On signing the lease he paid a month's rent and received the key of the house. Ten days afterwards the house was discovered to have been used by persons engaged in making counterfeit coins. From this time it was vacated, and remained unoccupied until the end of the month. At the end of the month—the defendant not having been as yet arrested—an unknown person brought the same key which the defendant had received to the same place at which he had received it, and returned it there to the same person from whom he had received it. This having been proved without objection, proof that the bearer of the key said, on returning it, that he was directed to leave it there, was admissible.

4. No special artistic, professional or scientific experience is required in order to make an expert as to the subject of his testimony.

INDICTMENT for procuring or assisting in the making of counterfeit coin.

MOTION FOR NEW TRIAL.

THE DEFENDANTS, father and son, were prosecuted, under the 20th Section of the act of 3d March, 1825, for procuring counterfeit coin to be made, or assisting in making it. Numerous pieces of such coin, finished and unfinished, were found in a house in Philadelphia, in which a man was detected almost in the act of making other pieces. This counterfeiter* was then in company with a woman, who must have known what he was doing. Neither of the defendants was then in the house. The defendant William B. Tarr had, about ten days before, rented it for a month, and afterwards from month to month, at a certain monthly rent payable in advance. His father, the other defendant, who occupied a room in it, was approaching it at the time of the detection of the above mentioned counterfeiter, and was arrested at a short distance from it. No counterfeit coin, or other suspicious thing, was found upon the person of the father, or in the room which he occupied. Counterfeit pieces, and machines, implements or materials which might be used in making them, were discovered in every other occupied apartment of the house, in places where they could scarcely have been unseen by any other inhabitant of it. Any one of the machines, implements and materials might, separately have been used in some innocent employment. But, in their connection with one another, and with the finished and unfinished counterfeit pieces, no reasonable doubt of their purpose or adaptability could be entertained. The son's name was William Barton Tarr. He had subscribed to the lease of the house the name W. Barton. Shortly before leasing it, he had, in company with the same woman found in it as above, twice visited the parties from whom he rented it, calling her his wife; saying that he was going away, and wished to see her permanently settled before his departure. He received, in person, the key of the house when he signed the lease. He then paid a month's rent in advance. A brother

* He had since been tried and convicted in this Court.

of this defendant testified, on his behalf, that he was unmarried; that, in their former correspondence, he sometimes had signed his letters W. Barton; that these letters were all destroyed; that the two brothers had latterly been engaged together at Camden, New Jersey, in the business of dyeing and scouring; that this business had been finally closed between them on the day after that of the date of the lease, of which lease however this witness knew nothing, and that the defendant, on the day after their business was thus closed, left Camden for New York, to be absent two days. One of the persons from whom the house had been leased proved, for the prosecution, that the house was new, that unexpected delays in the plumber's work had prevented the introduction of the hydrant water, and that, three or four days after the date of the lease, this defendant, then in Philadelphia, complained of the delay; saying that he found it inconvenient to go across the street for water. Upon this evidence, it was contended for the prosecution that the defendant, William B. Tarr, had, upon his return from New York, become the actual occupant of the house; that he could not afterwards have been ignorant of the counterfeiting carried on in it, and that the inference of his guilt was fortified by the circumstance that he had subscribed a fictitious name to the lease. There was also evidence tending to show that, from the time at which the guilty use of the house had been discovered, he disappeared, and was not seen in Philadelphia until his arrest about three weeks later. The house had, in the meantime, been closed and unoccupied until the end of a month from the date of the lease, when the same key which he had received was brought back to the same place at which he had received it by a boy who told the landlords that he was directed to leave it there.

THE COURT instructed the jury that there was no sufficient evidence against Daniel Tarr to show that he had the legal or actual possession, or control, of any part of the house, except the single room, in which no proof of guilt or complicity had been found, and that, consequently, the testimony

would not warrant his conviction. The jury found him not guilty.

As to William B. Tarr, the court said that if the jury believed him to have actually occupied the other parts of the house, there was evidence from which they might find that he procured or facilitated the use of the house by other persons, for the purpose of making counterfeit coin of the denominations mentioned in the indictment; that if he, knowing persons to be engaged in such business, promoted the execution of their guilty purpose by harboring them in his house while thus engaged, he was guilty of assisting in making the coin, but that he should be acquitted if there was any reasonable doubt of his knowledge of their guilt, or of his participation, thus defined.

The jury found him guilty.

In the course of the trial, a deputy marshal who assisted in making the discoveries in the house, and had, for several years, been engaged in the performance of such official duty, and had before been similarly employed as a detective police officer in the city of Philadelphia, having examined the machines, implements and materials found in the house, deposed in chief as follows: "From my observation in many cases, during ten or twelve years in which I have arrested parties in places where counterfeit money has been found, I have become capable of knowing to what purpose articles like these, all of which I have seen in such places, can be applied." The defendants' counsel, interposing by leave of the court, cross-examined the witness as to the particulars and means of his knowledge, which appeared to be limited to his official experience. The same counsel then objected to any testimony from this witness, as to the purpose to which the articles were adaptable. The Court having overruled the objection, the witness testified that they could all be used in making counterfeit coin, and that though each one separately might be applied to some other use, he believed there was no such other use to which they could, collectively, be applied.

On the motion for a new trial it was contended that this evidence had been improperly received.

THE COURT said:

This question, in modified forms, has often arisen in prosecutions of this class. No special artistic, or professional, or scientific experience is required in order to make an expert as to the subject of the testimony. The coins of the United States cannot be lawfully made elsewhere than at the mint and its designated branches. Public statutes determine what coins may be lawfully struck; and prescribe the respective weights, forms and impressions of the genuine pieces. The mechanical appliances in use at the mint are simple, and their alternatives are well known. The chemical processes and their substitutes are also familiar. The subject is one which intelligent, well-informed jurors often understand sufficiently, without the testimony of an expert. A rule excluding all persons except officials of the mint from testifying on the subject as experts, would be inconvenient, and, on other grounds, objectionable. Unless this narrow rule should be adopted, the testimony of any person whose attention has been, from any cause, particularly directed to the subject, and whose observation has been, in any mode, particularly bestowed upon it, must be received. The latter appears to be the just rule. Where the witness is a detective police officer, the force of his testimony may sometimes, perhaps, be lessened by the consideration that his experience, from its having been confined to cases of imputed or suspected guilt, may have rendered him liable to unfavorable prejudices. This objection may, or may not, be removed, in particular cases, by opposing considerations. But the objection, though not thus removed, applies only to the weight of the testimony, without affecting the question of its competency. The force of such an objection was for the consideration of the jury, and not of the court. The testimony was, therefore, admissible.

Another question of evidence, argued on the motion for

a new trial, arose upon the testimony of a witness from whom the defendant had rented the house and received the key. This witness testified as follows: "At the end of a month, the key was handed to me by a small boy, *who said he was directed to leave it at the office.*" The defendant's counsel, not objecting to the testimony that the key was returned at the end of the month, objected to the reception of evidence of the message by which it was thus accompanied. The court admitted the evidence on the ground that the message was a part of the act of returning the key; remarking, moreover, that, as the return of the key might be deemed a symbolical surrender of possession of the house, the bearer of the key should, perhaps, be regarded as a messenger impliedly authorized thus to define the purpose of its return.

THE COURT, after hearing the argument in support of the motion, said that although there was no reason to be dissatisfied with the finding of the jury, the case was one in which the verdict should be set aside if any point, even one apparently trivial, had been wrongly decided at the trial against the defendant. But, on this point, the court retained the opinion expressed at the trial, citing the remark of Coleridge, J., in 8 Carr. & P. 105, that "many things which pass by words are really acts;" adding that words may, in some cases, be part of an act, and may, in other cases, be demonstrative of its character, that an act might often, therefore, be described imperfectly, without proof of what had been said in performing it; and that in this case, if proof of the return of the key was admissible, a point which was undisputed, the accompanying message was an inseparable part of the act.

New trial refused.

DISTRICT COURT. JULY 19, 1861.

ADMIRALTY.

THE GENERAL PARKHILL.

1. When, through civil war against an established government, its courts of justice are closed in certain districts in which its laws cannot be enforced peaceably, hostilities for the restoration of its authority may be prosecuted in such modes as are lawful in foreign wars against public enemies.

2. When, in the prosecution of such hostilities, a naval capture has been made of a merchant vessel, which is afterwards libelled as prize, no resident within such hostile district can sustain a proprietary claim of restitution.

3. The President cannot make rules concerning captures on land and water. The Constitution has vested this power in Congress.

PRIZE.

LIBEL filed May 25, 1861.

CLAIMANTS intervene June 6, 1861.

George A. Coffey, for the United States.
George M. Wharton, for the claimants.

CADWALADER, J.

In December last, a convention of delegates, whose election had been provided for by the Legislature of South Carolina, proclaimed her independence of the Constitutional Government of the United States. This revolutionary attempt has been followed by similar acts of such conventions in ten other States. The eleven States are contiguous. A revolutionary Constitutional Confederation has been organized in them under the usurped authority of these conventions, with a co-operation, or acquiescence, of those administering the former State Governments. Incidental hostilities against the United States, including the capture of some of their forts, have been followed by organized opposing hostilities and counter hostilities on so large a scale, that the present proportions of the contest resemble those of a general war. In the prosecution of the naval hostilities on the

part of the United States, one of their frigates, on the 12th of May last, off Charleston, South Carolina, captured this vessel, then on a voyage from Liverpool to Charleston. She was brought for adjudication into this district, where a libel, praying her condemnation as a prize, has been filed on behalf of the United States. The material averments of the libel, which is more special in its form than has been usual in prize cases, are, that she attempted to violate the blockade of Charleston, and that she is the property of insurgents, traitors, and public enemies. If she is confiscable on the latter ground, the question of blockade will not arise.

A claim, with a prayer of restitution, has been exhibited on behalf of her alleged proprietors, who are described in the claim as of the city of Charleston, in the State of South Carolina, and citizens of the United States. They are thus, by their own showing, commercial residents of South Carolina. The question which thus arises, independently of that of the blockade, is whether, in the present hostile relation of South Carolina, a resident of that State can sustain a proprietary claim of restitution in a prize court of the United States.

The points upon which this question depends are to be ascertained, not from reasons which may have been assigned, or opinions entertained, by the naval captors, nor from orders which they may have received from the President, or from the Navy Department, nor from the President's proclamations, but from the allegations and proofs in the cause according to the rules of proceeding of the Court.

One of the purposes of naval warfare is to diminish the power of hostile governments, or of other hostile organizations, by the indiscriminate maritime capture of the private property of all persons residing in places within hostile dominion, or in permanent or temporary hostile occupation. The capture and confiscation of such property, by destroying or suppressing the maritime trade of such places, diminishes their wealth, and thus reduces the power of their hostile rulers. The liberation of the property when captured,

whether the individual residents who owned it are personally well or ill affected in feeling towards the government of the captors, would restore its value in wealth to the hostile place.

In prize courts, therefore, the property of every such resident, when captured at sea, has usually been regarded as confiscable. (3 Rob. 18, 26, 27, 28, and Appendix, B., p. 8.) The rule applies, though he may owe a duty of allegiance to the captor's government, and may, while in the hostile place, have been perfectly loyal in his own feeling and conduct. After the declaration of war against England, in 1812, a citizen of the United States, residing in England, before any knowledge of the war, shipped merchandise for the United States, which, having been captured on the voyage, was condemned as prize. The Supreme Court said: "Although he cannot be considered an enemy, in the strict sense of the word, yet he is deemed such with reference to the seizure of so much of his property concerned in the trade of the enemy, as is connected with his residence. It is found adhering to the enemy. Although not criminally so unless he engages in acts of hostility." (The Venus, 8 Cranch, 280.) If, on receiving information of the war, he had returned to the United States, leaving in England merchandise bought by him before the war, and it had afterwards been shipped for transmission to him, it would, if captured on the voyage, have been confiscable as *English* property. This appears from the cases of Escott, (1 Bos. & Pul. 349, 350, in the note; 1 Rob. 203; 8 D. & E. 557; 16 Johns. 459, 460,) and the Lady Jane, (1 Rob. 202; 8 D. & E. 557). Those predatory maritime hostilities which the law of war sanctions, could not be prosecuted with effect if this rule were not applied with inexorable rigor.

It has been thus applied, with regret, in cases of the temporary hostile occupation of places by an invading force, and in other cases of hardship where the intentions of the parties were such as might have entitled them to indulgence. During the war of our Independence, in the course of the

hostilities between France and England, some of the British West India possessions, including Grenada, were captured by the French, and held by them under temporary subjection. The hope constantly entertained by the British public, and by the Islanders, who were "still British in principle and affection, and many of them by actual residence," was that these islands would soon revert to the British dominion. The previous British monopoly of their trade under the restrictive colonial system, had made them dependent upon Great Britain for supplies of absolute necessity. The French partiality for their own islands induced them to withhold such supplies. In this necessitous condition of the sufferers, the question stated in an English prize court was, "whether it was so unlawful for a British subject to send supplies to the British plantations in the Grenada Islands, whilst under the misfortune of a temporary subjection to the French, as that a confiscation of the supplies so sent should be the just and legal consequence of his misconduct." An intended supply of provisions owned in, and shipped from, Ireland, having been captured on the voyage, this question was answered in the affirmative. The British Privy Council affirmed, on appeal, a sentence confiscating the cargo as constructively *French* property, notwithstanding its actual Irish ownership. (The Bella Guidita, 1 Rob. 207 to 209, and 209, 210 in the note; 8 D. & E. 559; 16 Johns. 460; see 4 Wheaton, 254; 2 Gallison, 501; 9 Howard, 615; 1 Dodson, 451.) The result would, of course, have been the same if the cargo had, when shipped, been owned by the parties in Grenada whose wants were to have been supplied, and this though they had, in affection, been the most loyal subjects of the British Crown. (The Hoop, 1 Rob. 198, The Lady Jane, Ib. 202.)

If, during an organized hostile contest like the present, against an established Government, rules of decision different from those which have been stated prevailed in the prize courts of such a Government, it could not effectively prosecute maritime hostilities to suppress rebellion or insurrection.

The question is whether any different rules of public law determine the question of confiscability during such a contest.

In this contest, the purpose of the revolted Confederates is to establish their independence of the Constitutional Union, and the purpose of the United States to maintain this Union inviolate.

The States which compose the Constitutional Union are not, with reference to it, either foreign or independent States. The several States are, it is true, independent of *one another*. They are also independent of the Government of the United States, except for such purposes as the Constitution specifies. But, for all the specific purposes for which it was adopted, the States are, with reference to the United States, dependent and subordinate, and not foreign States. In the Constitution, the word "foreign," occurring in five clauses of the original instrument, and once in the amendments, is always used in such a sense as to exclude its applicability to a State of the Union, or to anything appertaining to one. The States, therefore, though for some purposes foreign to one another, are for all national purposes embraced in the Constitution, united under a Government which is both independent and supreme. (6 Cranch, 136; 6 Wheaton, 381; 2 Peters, 590; 12 Peters, 720; 21 Howard, 517.)

The contest is thus an internal war, as distinguished from one of those hostile contests between established and mutually recognized governments, which are called foreign wars. The several acts which, in the respective Conventions of the revolted States, instituted the revolutionary movement, have been called Ordinances of *Secession*. The States in which these ordinances of attempted secession were promulgated, have also been called *Seceded* States. These phrases might mislead if the revolutionary character of the movement called Secession were excluded from its definition. The phrase, a *Seceded* State, might then imply that the attempted secession had been consummated, either in fact or in law. A careless use of the phrase, *right* of revolution, has often con-

founded its meaning, and that of the phrase, *power* of revolution. A revolution must have been consummated as an act of *power* before the question of its *rightfulness* can be judicially considered.

Therefore the result alone of this intestine war is to determine whether the power exists. Its existence or non-existence appears to be the sole question in the contest. Even governments which are not parties in such a contest cannot, without violating rules of public law, recognize the existence of a right of revolution in any case in which its assertion has not already been sustained by a sufficient power to vindicate and establish it effectively. (7 Howard, 1.) If the authority of an established government has been suspended in a part of its territory by insurgents, who have temporarily substituted a revolutionary government in it, other governments which are not parties to the contest cannot, without a breach of international decorum, declare precipitately that the case is that of civil war, as distinguished from rebellion or unorganized war. But if civil war, in truth, is its legal character, such other governments may lawfully treat the revolted insurgents, not as mere pirates or outlaws, but as entitled, in the war, to the same immunities as ordinary belligerants in a foreign war. This was done by the Government of the United States in the case of the revolted Spanish-American colonists when the proper time for deciding upon it arrived. But, in cases of revolutionary civil war, governments not parties to the contest cannot, without violating the rules of public law, institute conventional, or diplomatic, or other friendly relations with revolutionary governments, until their permanence has been established, either through their complete belligerent success, or through the old government's acquiescence, or continued inaction, or hopeless belligerent feebleness. Under this head of diplomacy many complicated questions between the representatives of superseded powers and foreign governments have arisen. But such disputable questions do not arise in judicial tribunals of the former governments. Neither the power

nor the right of revolt against a government can be asserted in its own courts. In England, the didactic essays and forensic arguments in support of the revolution of 1688 have been based upon its consummation as well as upon its asserted justice. The judicial opinions in support of it were, at its date, founded entirely upon its consummation. The technical reasoning on which they rested was, at first if not at last, quite as refined as it was practical. A criterion of the consummation of a revolution effected by the forcible deposition of an English king had been that the courts of law within the realm were no longer held in his name. The death of a king had, until the statute 1 Ed. 6, ch. 7, discontinued all pending proceedings in these courts. (7 Co. 29, 30.) His deposition by force had, when consummated, the same consequence, in this respect, as his death. (Year B. 10 Ed. 4, fol. 13 (a,) or 49 H. 6, pl. 1, Bl. Com. I., 249.) Records in the Fœdera show that a reigning king, when he crossed the sea, had usually deputed a viceroy to administer the government of England until his return; and a record in Rastall (544 (b) pl. 8, see Skin. 271) shows that when this was omitted, the king's absence from the realm had, in the discontinuance of process, the same effect as his death. When James II, in December, 1688, crossed the sea without making any delegation of an authority to administer the government in his absence, the argument of the supporters of the revolution was that, as the courts of justice could not be lawfully held, he had abdicated the government, and that the throne was therefore vacant when the new king and queen afterwards accepted the crown. A former crown lawyer was afterwards removed by the new government from his office, for questioning the soundness of this argument, and refusing to carry it out in one of its practical consequences. (12 St. Tr. 1269, 1270.) It received the sanction of judicial opinions, and was confirmed by declaratory legislation. (Skin. 271, 3 Mod. 252, 253; 1 W. & M. St. 1 c. 4, and 1 W. & M. St. 2 c. 1, 3 Lev. 283, 2 Ventr. 185, 193, 197.) In the next century, our Declaration of Independence,

and the belligerent success of this revolutionary movement, established the transformation of British colonies into sovereign States. Our own judicial tribunals, of course, dated this change of government from the time at which it was proclaimed. But British tribunals do not recognize it as having occurred until the subsequent pacification.

In 1794, in an English court, composed of most eminent judges appointed by a special commission, a leading counsel having observed "that a people had a right to alter their government," the Court said: "That proposition, under certain circumstances, may be true; but it ought not to have been introduced into a court of justice bound to administer the law of the existing Government and to suffer no innovation upon it." (24 St. Tr. 1371.) The Supreme Court of the United States have often said, in effect, that the consideration of political questions belongs, in the first instance, to other departments of the government than the judicial. When such questions are not involved immediately in the treaty-making power, and are not affected by any provision of the Constitution, or legislation of the government, they may, so far as its foreign relations are concerned, be determinable, to some extent, conformably with established rules of public law, by the President, through diplomatic intercourse or otherwise. But no question as to any political relation of the government of the Constitutional Union to one of the States, can be determined by the President, in any mode, for any purpose whatever.

None of the departments, or organs of the government, can ever lawfully recognize the existence of a *right* in one of the States to secede from this Union independently or distinguishably from a *power* to consummate such a revolution by hostile force; and no question as to the existence of such a *power*, as distinguished from right, can be entertained in the judicial or in any executive department of the government. To which of its departments the consideration of such a question, if it should ever arise, might belong, is not the present inquiry. That secession, so called, is neither more

nor less than *attempted*, as distinguished from *consummated* revolution, has been sufficiently shown.

The foregoing remarks do not suffice to define the legal character of the contest in question. It is a civil war, as distinguished from such unorganized intestine war as occurs in the case of a mere insurrectionary rebellion.

Civil war may occur where a nation without an established government is divided into opposing hostile factions, each contending for the acquisition of an exclusive administration of her government. If a simple case of this kind should occur at this day, the governments of nations, not parties to the contest, might regard it as peculiarly one of civil war. As between the contending factions, themselves, however, neither could easily regard their hostile opponents in the contest otherwise than as mere insurgents engaged in an unorganized rebellion. Thus, in the language of Sir M. Hale, every success of either party would subject all hostile opponents of the conquerer to the penalties of treason. A desire to prevent the frequency of such a result was the origin of the rule of law, that allegiance is due to any peaceably established government, though it may have originated in usurpation. The Statute of 11 H. 7, c. 1, (A. D. 1494,) excusing an English subject who has yielded obedience, or has even rendered military service, to a ruler who was king in fact, though not in law, was declaratory of a previous principle of judicial decision. (Br. Treason pl., 10, cites 9 E. 4, 12, should be 9 E. 4, fol. 1, b. pl. 2; Hawkins Bk., 1, ch. 17, sects. 10 to 16; Foster, 188, 396 to 403; 3 Inst. 7.) It has already been stated that a king, in whose name justice was administered in the courts of law, was usually regarded as in actual possession of the government.

Civil war of another kind occurs where an organized hostile faction is contending against an established government whose laws are still administered in all parts of its territory, except places in the actual military or naval occupation of insurgents or their adherents. In such a case, the question has been, whether a place in the actual military occupation

of the revolutionary faction, or of its adherents, may, under the law of war, be treated by that government as if the contest was a foreign war, and the place occupied by public enemies. In the case of a maritime blockade of such a place, the affirmative of this question was decided in England in the year 1836. It had previously been so decided by the Supreme Tribunal of Marine at Lisbon. (3 Scott, 201; 2 Bingh. N. C., 781.)

In the opinion of Grotius, Demosthenes had, in the case of the Thracian Chersonese, correctly stated the rule of public law to be that, wherever judicial remedies are not enforceable by a government against its opponents, the proper mode of restoring its authority is war. (De Jur. Bel. et P. Proleg., § 23.) The opinion of Grotius has given to this case, in which the views of Demosthenes prevailed at Athens, the force of a modern precedent. The Chersonese was a dependency of Athens when other parts of Thrace were under the dominion of Macedonia. The city of Cardia, in the Chersonese, resisted the Athenian authority. Deiopeithes, the Athenian commander in the Chersonese, was prevented from reducing the Cardians to submission through the interference of Philip of Macedon—then professedly at peace with Athens—who sent a military force to their assistance. Deiopeithes, considering this measure an act of hostility on the part of Philip, at once, without waiting for instructions from Athens, invaded and ravaged parts of Macedonian Thrace. Philip complained to the Athenians of this conduct of Deiopeithes. Demosthenes, in sustaining it, avoided assuming a defensive position as to the previously intended subjugation by Deiopeithes, of the Cardians, but incidentally justified it upon reasons which would have sanctioned the prosecution of hostilities against them on the same footing as if the war had been, as to them, a foreign one. Dismissing from consideration the charges against persons whom the judicial administration of the laws could reach, and who might, at any time, be judicially prosecuted, he contrasted their case

with that of those whom the laws could not thus reach, saying that attempts to enforce like remedies against them would only disorder and confuse the administration of the public affairs. "Against those whom the laws cannot reach," said he, "we must proceed as we oppose our public enemies, by levying armies, equipping and setting afloat navies, and raising contributions for the prosecution of hostilities." So an English statesman in a parliamentary debate upon a judicial question, said in the year 1696:—"You must provide for the Government, and when you cannot do it by course of law, then armies must do it when the courts are shut." (Speech of Harley, in Fenwick's Case, 13 St. Tr., 706.)

This doctrine is of obvious applicability to civil war of a third kind, which occurs where the exercise of an established Government's jurisdiction, has been revolutionarily suspended in one or more territorial districts, whose willing or unwilling submission to the revolutionary rule prevents the execution of the suspended Government's laws in them, except at points occupied by its military or naval forces. The present contest exemplifies a civil war of this kind. It was also, with specific differences, exemplified in the respective contests which resulted in the independence of the United Netherlands and of the United States.

The particular consideration of the legal character of the contest in question may be prefaced by a reference to a case in the Supreme Court of the United States, where a collision having occurred between the judicial powers of the Union, and of one of the States, Judge Johnson, who concurred in the Court's judgment, said: "The General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. Force which acts upon the physical powers of man, or judicial process which addresses itself to his moral principles or his fears, are the only means to which Governments can resort in the exercise of their authority. The former is happily unknown to our Constitution, *except as far as it shall be sanctioned by the latter.* But, let the latter be obstructed in

its progress by an opposition which it cannot overcome, or put by, and the resort must be to the former, or Government is no more." (1 Wheaton, 363.)

Within the limits of two of the States in which so called Ordinances of Secession have been proclaimed, the execution of the laws of the United States has not been wholly suppressed. They are enforceable in the Western judicial district of Virginia, and perhaps in the adjacent Eastern district of Tennessee. In the other nine States which profess to have seceded, including South Carolina, those laws are not at present enforceable any where.

The Constitution of the United States prohibits the enactment by Congress of a bill of attainder, and secures, in all criminal prosecutions, to the accused, the right to a speedy public trial by jury, of the State and district wherein the crime shall have been committed, which district must have been previously ascertained by law. Therefore, if a treasonable or other breach of allegiance is committed within the limits of one of these nine States, it is not at present punishable in any Court of the United States. This was practically shown in a recent case. (Greiner's Case, *ante*, p. 451) War, is consequently, the only means of self-redress to which the United States can, in such a case, resort for the restoration of the constitutional authority of their Government.

The rule of the common law is, that, when the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept open, civil war exists, and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land. The converse is also *regularly* true, so that when the courts of a government are open it is ordinarily a time of peace. But though the courts be open, if they are so obstructed and overawed that the laws cannot be peaceably enforced, there might, perhaps, be cases in which this converse application of the rule would not be admitted. (1 Knapp, 346, 360, 361; 1 Hale, P. C. 347; Co. Litt. 249, b.)

The present case is one in which the courts are in the strongest sense closed. That such a war as the present should be restricted in the modes of its prosecution, within limits more narrow than foreign wars, would frustrate its purpose, and place the former established government on an unequal footing with its hostile opponents. The doubt heretofore suggested has been, whether the former government has not, in such a contest, greater belligerent privileges than in a foreign war. By a treaty between England and the States General, their merchant vessels might, when England was at war, carry her enemies' goods without their being liable to capture. In the war of American Independence, it was decided in an English prize court that this treaty did not exempt the ships and goods of rebellious Americans, carried in Dutch merchant vessels, from confiscability. (The Aletta, cited 1 Hay and M. 13.)*

*During the civil war between the French Republic and the revolted Negroes of St. Domingo, the French having been driven out of possession of the principal part of the island, their government prohibited all maritime communication with places on its coast occupied by the rebels, under the penalty of confiscation of vessels and cargoes; and afterwards imposed the like penalty in all cases in which vessels going to or from such places might be captured at anchor, or under sail at a distance of less than two leagues from the coast. Merchant vessels of the United States trading with such places, having been captured at sea at distances, in some cases of less, and in others of more, than two leagues from the coast, were alike condemned in French prize courts. The judges of the Supreme Court of the United States, agreed in opinion that the French government's ancient sovereignty over the colony, must be considered as still subsisting. That France might exercise belligerent rights in the contest, in addition to those of her sovereignty, was asserted by Chief Justice Marshall, and denied by no other judge. A majority of the judges ultimately differed from him in opinion upon the question, whether, if the above mentioned acts of the French government were to be considered, not as belligerent, but as mere municipal regulations, the proprietorship of the former owners of the vessels and cargoes had been divested by the judgments of confiscation, where the captures had been made more than two leagues from the coast. The majority of the Court was ultimately of opinion that, whatever might have been, in this respect, the legal character of the regulations, the proprietorship had been changed by the judgments in these cases, as well as in those in which the captures had been within the two leagues. (4 Cranch, 513, 272, 293; 6 Cranch, 281, 285.) The Supreme Court of Pennsylvania was afterwards of opinion that the property had been changed in both cases.

A recurrence to the origin of the jurisdiction exercised in prize cases, will facilitate the application of some other authorities which it will be necessary to consider.

All suits arising from hostile maritime captures are called prize cases. In every such case, the captor's own government should punish his acts when illegal, and vindicate them when lawful. His government may become answerable for their illegality to the governments of injured persons. Diplomatic negotiations and serious international controversies may result, as often has occurred. For these reasons, the causes, modes and lawfulness of such captures, and all subsequent and incidental questions are investigated in peculiar tribunals of the captor's government, called, under some governments, Marine Courts, but in most countries Prize Courts. Their jurisdiction, except as liable to revision or appeal, is exclusive of that of all *other* courts of their own respective governments, and is altogether exclusive of that

Chief Justice Tilghman considered the acts of the French Republic as, not simple municipal regulations, but municipal regulations "connected with a "state of war with revolted subjects," in enforcing which "the Republic "might avail itself of all rights which are given by the law of nations to a "government thus circumstanced." He said, "The government of the "United States has taken no part between the contending parties. It has "never acknowledged the independence of the revolters. We are not "at liberty, therefore, to consider the island in any other light than as part "of the dominions of the French Republic. But supposing it to be so, "*the republic is possessed of belligerent rights,* which may be exercised "against *neutral* nations who carry on commerce with the revolters. *This* "*is not denied;* but it is said that the words of the *arrêté* prove that there "was no intention to exercise such rights. This argument is not conclusive. "Although the French government, from motives of policy, might not "choose to make mention of war, yet it does not follow that it might not "avail itself of all *rights to which, by the law of nations, it was entitled* "*under the existing circumstances,* under the *form* of a law made for the "regulation of the trade and commerce of one of its colonies. This was the "course pursued by Great Britain in the Revolutionary War with the "United States; and it has not been supposed that she violated the law of "nations when she captured and confiscated the vessels of neutrals who "carried on trade with the United States, in whatever part of the ocean "they were found by her ships of war and cruisers." (3 Binney, 252, 253.) The act of the British government to which reference was here made, will be mentioned hereafter in the text.

of tribunals of other governments. (2 Dougl. 594, 2 Br. P. C. 423; 7 Cranch, 432; 8 Cranch, 226; 4 Cranch, 434; 9 Cranch, 142, 145.)

The cognizance of prize cases in the Courts of the United States is not, as in the English Courts of Admiralty, a delegated or dependent authority, but is an inherent part of their general admiralty jurisdiction. Their prize law is, however, administered conformably to the practice established in England. The doctrines on both sides of the Atlantic are likewise the same, except in cases in which English Prize Courts have, in the opinion of our courts, mistaken or misapplied the rules of public law. In former wars, few such cases have occurred. Though Prize Courts are courts of the law of nations, this law is not always understood alike under all Governments. But, as the Supreme Court have said, the United States, having at one time, formed a component part of the British Empire, English prize law was our prize law, and when we separated, continued to be our prize law, so far as it was adapted to our circumstances, and was not varied by our legislation. (9 Cranch, 198; 8 Cranch, 284.)

Under the English, as under other European governments, the King's Council, in his name, anciently heard, in times of general, or partial war, those cases in which his own subjects or alleged non-belligerents, complained of naval captors on account of alleged wrongful spoilations, illegal seizures or other injuries. The royal Council entertained also petitions of the captors for the condemnation of their prizes. The exercise of the latter jurisdiction accelerated the termination of disputes between captors on the one side, and their fellow subjects, or professed neutrals on the other; and, in the absence of any known dispute, quieted the titles of the captors. When the captures had, incontestably, been lawful, the condemnation was useful to the captor by extinguishing the right of postliminy, and thus converting his military title into a civil proprietary right. Subsequently, the Council of State, retaining an appellate and revisory jurisdiction,

delegated an original cognizance of prize cases to Courts of Admiralty, whose judges were lieutenants of the Admiral.

The probability that this jurisdiction of the Admiral and his deputies had been to some extent exercised before the year 1297, will appear by comparing two reports of a case in that year of a vessel captured off the English coast, which are in Selden's note 18, to Fortescue, c. 32; and in Fitzherbert Avowrie, pl. 192. Two cases mentioned in the Fœdera, one in a document of 19th of July, 1343, the other, which was the case of the St. Salvador, in a document of 29th of April, 1357, show that before the latter date the admiralty jurisdiction, in prize cases, was fully established in subordination to that of the Council, and that its exercise was regulated by a recognized international maritime law. Lord Mansfield has described the mode in which the jurisdiction was afterwards exercised in every war, under a royal commission to the Admiral and a delegation by him authorizing the Court of Admiralty, and its Lieutenant and Judge, and his Surrogates, to hear and determine all cases of capture, prize and reprisal of ships and goods, according to the course of the admiralty and the law of nations. (2 Dougl. 614.) Whether, without any such special commission, the jurisdiction in prize cases would have been to any extent exercisable by that court, under the general commission to the Admiral, and his ordinary delegation to the judge, is a question which the mode of organization of Admiralty Courts in the United States renders here unimportant. In whatever mode the jurisdiction may have been delegated in England to the Admiral, and through him to his court, the royal council did not relinquish their optional right of exercising it themselves in the first instance, as before. Besides their appellate, and an occasional supervisory jurisdiction, they still sometimes took original cognizance of those prize cases which involved important affairs of State, particularly such as might complicate the diplomatic relations of the government. The Council were partially relieved of this

burden by two statutes, one of the year 1353 (27 E. 3, St. 2, c. 13), the other of 1452 (31 H. 6, c. 4), which were interpreted in 1484 as, together, giving to the Chancellor an original cognizance of complaints of maritime spoilations at the suit of either subjects, or foreigners not hostile, and authorizing him to decide such cases with or without the assistance of any of the judges. But these acts did not exclude the Council from a concurrent original jurisdiction. (Letter in the Fœdera of 19th July, 1343, to the King of Aragon, cited above; Year Book, 2 R. 3, fol. 2, pl. 4; 4 Inst., 152; 2 Bulstr., 27; 3 Swanston, 603, 604, 605, 606, 662, 664. See also 2 Vernon, 592; 1 Ves., 98; 1 Eden., 130; which three cases were, however, within the general equitable jurisdiction of the Chancellor.)

The rule of public law requiring a judgment of condemnation by a marine, or prize court, as indispensable to the vesting of an ownership of confiscable hostile property in maritime captors, or in their government, has been established by the consent of nations, upon sound reasons of common interest. At what precise date this rule acquired its present absolute character, is, perhaps, uncertain. To recur to the earliest indications of its recognition is not necessary. We find its observance prescribed, and its reason explained, in an English order in Council, proclaimed, on 30th July, 1426, which is in the Fœdera, in the words, "that no goods captured in any manner whatever shall be distributed, disposed of or sold, at sea, or in any port or harbor, at which they may arrive, but shall be kept, without breaking of bulk, until the Royal Council, or the Chancellor of England, the Admiral of England, or his Deputy General, for the time being, shall be certified and duly informed of the capture, *that it may be known whether the captured goods are the property* of *enemies or friends.*"

This inquiry, whether the subject of capture is *enemies' property,* is always, in *technical form,* the question of *confiscability* in a Prize Court. We will see, presently, that in the phraseology of prize law, the designation, *enemies' property,*

has a most extensive technical meaning. Its applicability, in the language of prize courts, and in that of treaties or statutes, may sometimes be very different.

Before considering the more enlarged meaning of the phrase, we may remark, that, in a foreign war, a prize court never entertains the claim of a person residing in a hostile belligerent State, as an alleged owner asking restitution of his captured property, unless for some special reason which deprives it of a hostile character. Such an exemption from confiscability as is allowed in the case of a cartel, or of a licensed or privileged vessel or cargo, prevents the claimant from being, in a relative sense, an enemy. Except in such peculiar cases, no claim of any citizen or subject of an enemy's country can be received; and every resident of a hostile place or country is regarded in such a court as a citizen or subject. His property, when libelled, at the suit of the captors or their government, is condemned, without his being heard, as that of an enemy. Nothing remains to such a former proprietor but that hostile right of postliminy, or hope of recapture, called a mere scintilla juris, which every enemy retains until either confiscation or pacification. (8 Cranch, 226.) A pacification terminates the right of postliminy, vesting in the captors, or in their government, as against their late enemies, an absolute ownership of all captured property. Such property, unless the treaty of peace provides expressly for its restoration, may be subsequently condemned, (18 How. 110,) but cannot be restored to one who was, at the time of capture, an enemy. Thus, on a question of mere proprietorship, there can be no exercise of the jurisdiction of a Prize Court for the benefit of a party who, in respect of the captured property, is regarded as hostile, because the capture has produced, as between the belligerents, a complete divestiture of his former property. (8 Cranch, 226; 3 Wheaton, 446; 6 Rob. 138; 1 Dodson, 244, 245, 451.)

In the technical, more extended meaning of the phrase "*enemies' property*," as understood in prize courts, it includes

everything captured at sea which is confiscable on account of its hostile character, or of its proprietor's absolute or only relative hostility. Sir William Scott said that *property of enemies* was " held, in construction and practice, to embrace all property liable to be condemned as prize;" adding that, "by fiction, or rather by intendment of law, all property condemned is the property of *enemies*, that is, of persons so to be considered in the particular transaction." (5 Rob. 176.) This phraseology needs no explanation where a subject of maritime capture is contrabrand of war. It is hostile, whatever may be its actual ownership. In language borrowed, in part, from Lord Grenville, "If I have wrested my enemy's sword from his hands, the bystander who furnishes him with a fresh weapon" is more than constructively hostile to me. Chief Justice Marshall exemplified the doctrine by the case of a search resisted (see 5 Rob. 176, and in the Fœdera, the letter of 9th July, 1343, above cited), or of an attempt to enter a blockaded port, saying that, in such cases, "the laws of war, as exercised by belligerents, authorize a condemnation as *enemy's* property, however clearly it may be proved that the vessel is, in truth, the vessel of a friend (3 Cranch, 488)." The latter example is one of property only constructively hostile.

Judge Story, in delivering an opinion of the Supreme Court, said, "By the general law of prize, property engaged in an illegal intercourse with the enemy is deemed enemies' property. It is of no consequence whether it belong to an ally or to a citizen. The illegal traffic stamps it with the hostile character." (8 Cranch, 384. See 18 How. 114.) Judge Washington, in the Circuit Court, said that in England, almost as far back as the decisions of the Prize Court could be traced, the property of a subject engaged in trading with enemies had been considered as enemies' property, and the owner, *pro hac vice,* as an enemy." (3 Wash. C. C. 183.) This had previously been the language of Sir William Scott, (1 Rob. 219, 220;) and nearly the same language was afterwards used again by Judge Washington, in the Supreme

Court, in the case of the Venus, already cited. (8 Cranch, 253.)

That, and other decisions which have been mentioned, show that, in the case of persons owing allegiance to the government in whose Prize Court their captured property is prosecuted as hostile, the applicability of the designation, *enemies' property* may be independent of the question whether they are traitors to their government. A learned Admiralty judge said that the same conveyance of intelligence to enemies, which would hang a spy, would condemn a vessel. (Stewart, 494.) Here he had in view the law martial, rather than the law of treason. But, in the United States as in England, persons owing allegiance to the government are guilty of treason when they furnish, or attempt to furnish, enemies of the government with intelligence or supplies which may be useful in war. Such persons, however, by the law of England, though guilty of a misdemeanor, commit an offence of no higher grade when they engage in commercial intercourse of any other kind with enemies. (2 Ro. Abr., 173 Guerre L., pl. 3; 16 Vin., 598, 599; 12 St. Tr., 789, 799, 809, 811; Lord Hardwicke's note mentioned in 1 D. & E., 85; 8 D. & E., 550; 25 St. Tr., 1426; and see 1 Rob., 202, 203—the Elizabeth, of Ostend.)

During the last war with England three acts of Congress, of which one is expired and the others repealed, were passed in order to make specific offences under this head, indictable in courts of the United States. (2 St. U. S., 778, 3 St. U. S., 84, 195, 226.) Judge Washington remarked, with reference to the jurisdiction of English tribunals, that a Prize Court would treat the property of a subject engaged in maritime trade of either kind as the property of an *enemy*, but "the common law courts would treat him personally as a traitor, or as guilty of a misdemeanor, as the case might turn out." (3 Wash. C. C., 183.) We have seen that the local residence of a party may, in a case in which he would otherwise be thus guilty of a mere misdemeanor, exempt him altogether from legal criminality. (See 6 Rob. 408; 8

Cranch, 280.) But in this, as in the two former cases, his property engaged in the trade is, in a Prize Court, confiscable as *enemies'*.

During a civil war against an established government, the phrase *enemies' property*, as understood in prize courts of this government, includes all property captured at sea which is actually or constructively hostile. During the civil war in Portugal, between the Queen and Don Miguel, she established a blockade of ports along the coast of her own kingdom: In a case already cited, the Supreme Tribunal of Marine at Lisbon, having condemned as prize a vessel of English ownership, which had been captured for attempting to break the blockade and supply Don Miguel's adherents with warlike stores, it was held by a British court, in the year 1836, that the judgment of the Portuguese Prize Court, whether on the ground of an attempted breach of blockade or on that of an attempted supply of contrabrand goods, was conclusive proof that the vessel was owned by *enemies* of the Queen of Portugal, though Portugal was not then at war with any foreign government. (3 Scott, 202, 203, 228; 2 Bingh. N. C., 781, 782, 783, 798.)

Whether in the phrase "*public* enemies," used in this libel, the word *public* might not alter the effect otherwise attributable to the word *enemies*, is a question which need not be considered, because the words *insurgents* and *traitors* are also used. But I doubt whether the point would have been important if these words had been omitted. In the case of the Adeline, (9 Cranch, 283, 286,) property captured in a public foreign war was libeled as enemies', when the case, as to part of it, was one of salvage only. The Court thought there was no sufficient objection to a decree for salvage as to this part, and that if the objection could have been sustained, it would have resulted only in a remand of the cause, that the libel might be amended. The present libel, as it stands, must have the same effect as if it had simply averred that the property in question was lawful prize. This, without any special allegations, would have sufficed (1 Dodson,

82, 83; 2 Wheat. App'x, p. 19.) In the case of the Adeline, the Court said that no proceedings can be more unlike than those in the courts of common law and in the Admiralty, and that this is especially true in prize causes. (9 Cr., 284.)

We may here apply to prize cases arising upon maritime captures during a civil war, the remark which, with a different application, has been already made and explained, that phraseological distinctions in the common law as to treason do not regulate or control the proceedings in this court against the captured property, or affect the question of its confiscability.

Here two cases are to be considered; the first, that of property actually hostile from its character or that of its owners, and the second, that of property constructively so from the residence of its owner at a place in hostile occupation.

The first case is, I suppose, undisputed where the property is from its character directly hostile, as where it is contraband of war. There is quite as little reason to dispute the confiscability of the property of persons engaged in traitorous hostilities, or their adherents, though it be not contraband of war. Such property is confiscable even in the case of a mere insurrectionary rebellion, or unorganized war. In the distinctions of the English law, between confiscations for certain specific treasons and for mere felonies, we may perceive the recognition of a principle from which the rule may be deduced. In the Bishop of Durham's Case (A. D. 1327), the forfeiture, in cases of treason, is called forfeiture *of war*, (1 Hale, P. C., 255, 256;) and Sir E. Coke mentions a decision of Fineux, C. J., in the reign of Henry VII, that if the Chief Justice of the King's Bench, who is the Supreme Coroner of all England, in person, upon the view of the body of one killed in open rebellion, records it and returns the record into his own court, the lands and goods of the deceased traitor shall be forfeited though he never was attainted, (4 Rep. 57 (b), 4 Bl. Com. 382.)* But our present

* In this reign, the jurisdiction of the Court of the Constable and Marshal of England, was still exercisable. The extent of this jurisdiction, which

concern is with authorities on cases of maritime capture. Judge Dunlop has, in a recent case, informed us that, on examination of the writers on public law he does not find any difference as to belligerent rights in civil or foreign war. One of the purposes of a French ordinance of 8th August, 1582, was to ascertain the sense in which the phrase *enemies of the king* had been used in the articles on prize jurisdiction in previous admiralty ordinances. The prior ordinances of 1373 (usually cited as of the year 1400*) of 1517 and of 1543 may be found unabridged in Fontanon's collection. A comparison of them with the ordinance of 1582 would show that the phrase had been intended to include both rebels or enemies in civil wars, and hostile opponents against whom reprisals or partial war had been authorized. In the Black Book of the English Admiralty, the articles under the heads C. and D. exhibit so many instances of attempts to usurp jurisdiction that I would not cite any of them if they had not been frequently quoted by Admiralty judges in the United States

originated, like that of the Admiral's Court, in a royal delegation of authority, was defined in a declaratory statute of the year 1389. This act was intended to prevent incroachments of the Constable's Court beyond the bounds of its legitimate former jurisdiction. The case of Haulce *v.* Rosque, (about A. D. 1393), mentioned in the note to 2 Knapp's Reports, 150, shows that this jurisdiction included controversies arising from the capture of booty on land in a foreign war. The statute indicates that the jurisdiction was also exercisable during war *within the realm.* The statute declared "the "power and jurisdiction of the said Constable in the form that followeth: "To the Constable it pertaineth to have cognizance of contracts touching "deeds of arms and of war out of the realm, and also of things that touch "*war within the realm,* which *cannot be determined nor discussed by the* "*common law* with *other usages and customs to the same matters pertain-* "*ing,* which other Constables *heretofore have duly and reasonably used in* "*their time.*" (13 R. 2, St. 1, c. 2.) Unless the application of the latter words must be limited to cases in which the realm was invaded by foreign enemies, which perhaps cannot be demonstrated, the language bears upon the present question, because the admiral cannot then have had a less extensive jurisdiction as to things "*done upon the sea,*" arising from "war within the realm." His jurisdiction, whatever may have been its legitimate extent, did not afwerwards, like the Constable's, become obsolete. The references in this note might, possibly, through a more extended research be so compared with other discoveries, as to elucidate the point in question.

* See, as to its date, Pardessus Coll., IV., 224.

and in England, as of authority. In this book articles D, 1 to 18 inclusive, are those Admiralty usages which an inquisition of the year 1375 reported as proper for future observance. Articles D, 19 to 81 are precepts for Admiralty inquisitions, without the returns. Those numbered D, 19 to 40 were probably issued between the years 1375 and 1378, and the subsequent articles to D 81, probably not later than 1389. Article D 20 directs inquiry to be made concerning all those who victual or refresh any of the enemies of the king, or the rebels of Wales, with any manner of victuals, artillery, armor, corn, salt, iron, steel, or any other thing by which they are helped or strengthened. Article D 31 directs inquiry to be made concerning all those who receive and keep in their ships any goods or chattels of any man attainted for treason, without rendering the same to the king, or to the admiral or his lieutenant, for the king. And Article D 58, directs inquiry to be made of all who sustain or receive in their ships any men outlawed or banished, or their goods or chattels. At the time of the Duke of Monmouth's rebellion, in 1685, the goods of rebels which were captured at sea appear to have been condemned in England as prize, in the Court of Admiralty. (Hay and Marriott, 47, 48.) This occurred likewise at the rebellion of 1715. A case of the ship Duke de Vendome, determined in 1716, was cited by Sir George Hay. (Ib. 47.) The dispute was not as to the confiscability of the captured property, but whether it belonged when condemned, to the king or to the admiral. Other prize cases, of the same kind, were similarly adjudged after the rebellion of 1745, when there was no act of Parliament on the subject, though there was legislation to facilitate prosecutions for treason in courts of common law jurisdiction. (Ib. 47, see Stat. 19 G. 2, c. 9.)

It remains to consider cases of property condemned as hostile merely from the residence of its owner at a place, or in a district which is in hostile occupation during civil war. Cases of this kind occurred in the civil wars already mentioned between Spain and the United Netherlands, and

between England and the United States. There was this difference between the two wars. The United States, from the commencement of hostilities, even before the Declaration of Independence, until the termination of the war, considered all trade or intercourse with England unlawful, and treated it as intercourse with enemies. (See 16 Johns, 473, 474.) The Netherlands, in the outset of their contest with Spain, prohibited their subjects from furnishing her with warlike supplies, but until 4th April, 1586, did not prohibit commercial intercourse of all kinds. An absolute prohibition of all trade with Spaniards was contained in an edict of this date, followed, on the 18th of July, 1586, by one of like effect. But by another edict of the 4th of August, 1586, the effect of the two former edicts was restrained, so as only to forbid trading with such places in Belgic territory as were in Spanish possession. These differences did not affect differently the course of Spain and England as to captured property of residents in the revolted provinces. The preamble of the Dutch edict of the 4th of April, 1586, stated that the Kings of Spain had already confiscated Belgic vessels, both in Spain and Portugal, and that there was reason to expect other naval captures and confiscations. In the reference to the confiscations which had already occurred the Dutch word rendered in the translation furnished me by the word *confiscate*, is, in Bynkershoek, *publicasse*, which Mr. Duponceau translates *condemned and sold*. Bynkershoek must have understood the confiscations as having been judicial; and he mentions them without questioning their propriety. (Bor. II, 703, Bynk.; de Reb. Bel., ch. 3, Duponceau, p. 12; Hall's L. Jour., vol. 3.)

In England, soon after the commencement of the hostilities on this continent, which preceded our Declaration of Independence, a statute (16 G. 3, c. 5,) was passed which, in its first and second sections, was in the form of a *declaratory* law. In this particular, the effect of its enactments has been misunderstood by some of those who have sited it. The first section, after stating that *many persons* in the colo-

nies had set themselves in open rebellion and defiance to the authority of the government of England to which they were subject, and had assembled an armed force, engaged the king's troops, and attacked his forts, had usurped the powers of government, and prohibited all trade and commerce with his dominions, for the more speedy and effectual suppression of their designs, and preventing any supplies or assistance from "being sent thither during the continuance of the said rebellous and treasonable commotions," *declared* and enacted that all manner of trade and commerce was and should be prohibited with the colonies, naming them, and that all ships and vessels, of or belonging to their *inhabitants*, with their cargoes, etc., and all other ships and vessels with their cargoes, etc., trading in, or going to or coming from trading in, any port or place of the said colonies should be forfeited, as if they were the ships and effects of open enemies, and should be so adjudged in all courts of admiralty and other courts. The latter provision was a mere declaratory continuance of the restrictions and penalties which had previously secured the British monopoly of the colonial trade. The declaratory form of the whole section shows that the ships of all inhabitants of the colonies and their cargoes, would, in the opinion of the British Parliament, have been confiscable without any legislation upon the subject.* The second section which was also in its form declaratory, provided for a limited exemption of vessels trading for specified purposes, under British licenses, from confiscability. The remaining sections were not declaratory. They were, in part, intended to remove difficulties as to the rights of captors, by placing their prizes on the footing on which other statutes had placed prizes captured in foreign wars.

In the reported decisions of the English Admiralty Court, during this war, the successive judges exhibited each a strong desire to find reasons for exempting from confiscation the captured property of persons residing in the United States who adhered to the British cause. In the case of a foreign

* See the opinion of Tilghman, C. J., quoted in a former note.

war, an English subject leaving the enemy's country at the commencement of hostilities, and *bringing with him* property owned by him before the war, had, in prior cases, been indulged by a limited exemption of the property thus *brought with him* from confiscability. But this exemption had not been extended to goods brought with him for trading purposes, or even to goods which would otherwise have been exempt if they came in another vessel. The captured property of the American loyalists who were on their way to England, was exempted. Sir George Hay was inclined to go farther, and exempt the captured property in all cases, unless its owners were proved to have been concerned in some act of rebellion. (Hay & M. 46.) But he never made any such decision; and both he and Sir James Marriott, who succeeded him, condemned all the property of loyal inhabitants of the United States, except that which they brought over with them in the same vessel in which they came. (Ib. 212; and see pp. 4, 78, 80, 94, 95, 83, 216.)

Upon the reasons which have been stated, and authorities reviewed, this vessel should be condemned as prize. But it is objected, that Congress had not legislated upon the existing war; that the President alone had directed and regulated the prosecution of hostilities, and that, when this vessel was captured, he had not ordered any other captures than for breach of blockade. These objections are insufficient. Any nation may be involved in a war which has not been declared, and as to which her government has not legislated. Judges of English Prize Courts have agreed with Bynkershoek in the opinion which publicists no longer dispute that the legal consequences of an actual war must be the same, whether it has or has not been formally declared. The only modern intimations of a contrary opinion as to a foreign war are in Stewart's Reports, pages 304 and 414, which I consider as overruled in 1 Dodson, 247. (See Hay and Marriott, 252, 253.)

In the course of the argument *partial* war with a foreign State seems to have been somewhat confounded with *in-*

formal war. A partial war may be informal, or may be more or less or quite formal. But the present inquiry does not involve any distinctive doctrines of public law concerning partial war. Therefore, the cases which arose under acts of Congress authorizing the limited hostilities prosecuted against France at the close of the last and commencement of the present century, may be dismissed from consideration.

In 1846, when Congress was in session, the United States were involved in a general war which was informally begun. The war which Mexico had for some time threatened then broke out suddenly. Congress thereupon declared that, by an act of Mexico, a state of war existed between her government and the United States. If no such law had been enacted, there would, not the less, have been war with Mexico. The President, must, then, as Commander-in-Chief of the Army and Navy, have directed its prosecution conformably to the rules of public law. This he must, at all events, have done, if Congress had not been sitting when the Mexicans attacked our army.

The case of a civil war is practically the same. The Marshal of the United States, in order to keep the peace of his judicial district, and enable himself to execute the process of the courts, may arm himself and his deputies, and may also call in the aid of a warlike force. (Year B., 3 H., 7 pl. 1, 5 Co. 72, a; Br. Riots, pl. 2; Dalton, ch. 95, 8 Watts & Serg. 191, 5 Carr & P. 254, 282.) When he cannot, by such means, keep the peace of his district, and the courts in it no longer can direct their process to him, a state of war exists.

The President in such a case is required by the Constitution to "take care that the laws be faithfully executed." While other officers only swear to support the Constitution, his official oath, as prescribed in it, requires him "to the best of his ability" to "preserve, protect and defend the Constitution." Therefore, when hostilities actually waged against the Constitution and laws, assume the dimensions of a general war, he must prosecute opposing hostilities, offen-

sive as well as defensive, upon such a proportional scale as may be necessary to re-establish, or to support and maintain the government.

But he cannot* make "rules concerning captures on land and water." The Constitution has vested this power in Congress. The President cannot prosecute hostilities otherwise than according to the directions of existing acts of Congress, or to the rules of public law. Without his orders an officer of the navy capturing this vessel would have performed a lawful act. Had the President forbidden her capture the officer might have been punishable for disobedience of orders, but the vessel should not for that reason be liberated by a Prize Court, if she was in law confiscable.

The claim is rejected.

SENTENCE.

I, JOHN CADWALADER, Judge of the District Court of the United States, in and for the District aforesaid, duly authorized under the Constitution and laws of the United States, to hear and determine, in the said District, all causes and complaints as to ships or vessels and goods, etc., seized and taken as prize, having heard and considered the merits and circumstances of a certain cause or proceeding respecting the capture or seizure of a certain ship called The General Parkhill, whereof William H. Forbes was master, her tackle, apparel and furniture, also against the goods, wares and merchandise, laden on board the same, captured as prize by the steam frigate Niagara of the navy of the United States, under the command of Captain William W. McKean, and brought into the port of Philadelphia, in the said District, which cause or proceeding was lately and still is depending before me: And it appearing that the said capture was made on the high seas on the 12th day of May, in the year 1861, at and before which time civil war existed between the United States and inhabitants of the State of South Carolina and

* See 8 Cranch, 126 to 129, 427; 9 Cranch, 422, and the Acts of Congress of 3d March, 1799, ch. 45; and 3d March, 1813, ch. 71.

other persons confederated for hostile purposes against the United States, by reason whereof the judicial tribunals of the United States for South Carolina were closed and could not be kept open, nor could the laws of the United States be executed by their officers and ministers of justice, or otherwise peaceably enforced or executed within the said State; And George A. Coffey, Esquire, Attorney of the United States, in and for the said Eastern District of Pennsylvania, having, by libel allowed in the said proceeding, alleged that, at the time of the said capture the port of Charleston in the said State of South Carolina, was blockaded by naval forces of the United States, and that the said ship when captured was attempting to violate the said blockade; And having further in the said libel alleged that the said ship, her tackle, apparel and furniture, and the said goods, wares, and merchandise, were the property of insurgents, traitors and public enemies, and were, for the reasons aforesaid, or otherwise, liable to confiscation and condemnation as lawful prize; And the said William H. Forbes, master as aforesaid, having, in and by a certain claim allowed in the said proceeding, intervened for the interest of John J. Patterson and John L. Stock described in the said claim as "trading as Patterson and Stock of the City of Charleston, in the State of South Carolina, and citizens of the United States," and making claim to the said ship, her tackle, apparel and furniture, and to the cargo, to wit: salt in bags, laden on board, and alleging that he, the said William H. Forbes, was, as master, in possession of the said ship and cargo, at the time of her alleged capture, and that the said Patterson and Stock were then, and at and from the time of shipment had been, and still were and are, the true and bona fide owners of the said ship and cargo, to whom and no other person the same did, and when restored would, belong; and praying the liberation and restoration of the same to him for the said alleged owners, and that the captors should be condemned in damages and costs; And it appearing to the Court that if the said ship and cargo were confiscable on the ground that they were

owned by persons within the proper description of enemies in the said civil war, the question of blockade or breach, or attempted breach thereof, would not arise, the said cause was heard and argued by the said attorney on behalf of the United States, and by Messieurs Wharton, Harrison, Guillou and Gerhard, advocates and proctors for the said Patterson and Stock, upon the question whether, in the present hostile relation of South Carolina, the said Patterson and Stock who, by their own showing were commercial residents of that State, could sustain a proprietary claim of restitution in a Prize Court of the United States. And the said question having been considered, and the advocates and proctors above named of the said Patterson and Stock, praying the liberation and restoration aforesaid, and the said attorney of the United States praying that the said claim should be rejected and the said ship and cargo condemned as prize; And the said claim and the proofs having been read, and it appearing that Charleston aforesaid, was, at and before the time of the said capture in the hostile occupation of enemies of the United States in the said civil war. I the said Judge, on the 20th day of July, in the year 1861, rejected the said claim as to the said ship and cargo; And afterwards on the 23d day of the same month, by interlocutory decree, pronounced the said ship to have belonged at the time of the capture and seizure aforesaid, to enemies of the United States in the said civil war, and, as such, or otherwise, subject and liable to confiscation, and condemned the same as good and lawful prize; And on the application of the said attorney of the United States, ordered that the said ship, her tackle, apparel and furniture, be publicly sold by the marshal, according to the course and practice of the Court, and that the proceeds of sale be brought into the registry of the Court, to abide its order and direction.

JOHN CADWALADER,
District Judge.

This sentence was read, signed and promulgated by the Judge aforesaid on the twenty-third day of July, in the year

of our Lord one thousand eight hundred and sixty-one, at the District Court Room, in the City of Philadelphia.

G. R. FOX, *Clerk.*

DECREE.

And now this 17th day of September, A. D. 1862, the Clerk of the Court reporting that of the proceeds of the sale of the vessel and cargo condemned in this case, in the Registry of the Court, after deducting all unpaid costs, charges and expenses, there will remain $7,188.76. And the Attorney and Marshal of the United States and the prize commissioners, in open court assenting to the said report, it is, on motion of the Attorney of the United States ordered that the sum of $7,188.76 be paid forthwith into the Treasury of the United States for distribution between the United States and the naval captors according to the statutes in that behalf provided.

And it further appearing that the said vessel and her cargo have been fully condemned as prize and that the prize commissioners have in pursuance of the act of Congress of 25th March, 1862, reported to the Court the requisite evidence, showing the name of the public ship of the United States entitled to share in the said prize, and whether the said prize was of superior, equal, or inferior force to the vessel making the said capture, now therefore it is adjudged and decreed that the said prize was of inferior force to the vessel making the said capture and that the United States steam frigate Niagara, commander William W. McKean, is the only vessel entitled to share in the said prize.

DISTRICT COURT. AUGUST 7, 1861.

ADMIRALTY.

THE ELIZABETH ANN.

A merchant vessel was fitted out during the civil war in the island of Chincoteague, a dependency of the State of Virginia, but then virtually in the occupancy of the United States, and the inhabitants of which were reputed loyal. *Held*, that the case was to be distinguished from The General Parkhill, and that such vessel was not prize of war.

PRIZE.

FROM THE MINUTES.

Mr. Harrison, for the complainants, moves that a monition be awarded requiring the captors, or the Attorney of the United States, to proceed to adjudication on the question of prize or no prize.

Mr. Coffey, the Attorney of the United States, and advocate of the naval captors, states that on behalf of the captors, and of the United States, he waives the monition, and states further, that if the claimants are willing to accept the restitution of the captured property, it is not intended to oppose its restitution to them, or to institute proceedings for its condemnation as prize.

WHEREUPON THE COURT SAID :

It appears that the laws of the United States may at present be peacefully executed in the small island of Chincoteague, off the coast of Virginia, where these claimants reside. The lighthouse of the United States, which is the principal structure on the island, is maintained under the flag of the United States by a superintendent appointed by the proper department of their government, who recognizes, and acts under, the authority of that department. The inhabitants of the island are few in number, and from the information received by the court, through the District Attorney of the United States, have been loyal during the revolutionary contest in other parts of Virginia. Their insular position,

and the fact that the ship channel inside of the island may be commanded by the naval forces of the United States, enables the Court to make, in their favor, a distinction which, in the present hostile relation of Eastern Virginia, might be impossible in the case of a resident of the State on the other side of this channel.

These views take the case of the claimants out of the rule of decision in the late case of the General Parkhill. The advocate and proctor of the claimants will, therefore, say, whether they are disposed to accept restitution of the captured property without further proceedings. In so doing they will waive all claim upon the captors, and all complaint of the capture as having been made without probable cause.

Mr. Harrison thereupon stating, on behalf of the claimants, that they were willing to accept restitution of the property, and that the proceedings be terminated, the Court order that a decree be entered liberating the vessel and her contents from custody, and directing restitution to the claimants.

ORDER.

The opinion in this case was preceded by an order, which was as follows:

The Court having admitted the claim of Kendel Jester and John Bunting, owners of said schooner, subject to all legal exception, it is ordered that the depository and documents returned by the commissioner be unsealed and the same having been opened accordingly, leave is given by the Court that they be open to the examination of the proctor and advocate of the claimant and the Attorney General of the United States and Attorney of the United States for this District and his duly appointed deputy.

DISTRICT COURT. AUGUST 31, 1861.

ADMIRALTY.

THE ALBION.

Examination of persons captured in alleged prize vessel. How directed when they have not been sent to the place of adjudication.

PRIZE.

FROM THE MINUTES.

CADWALADER, J.

In this case the examination of the persons captured in the vessel is of immediate, as well as probable, ultimate importance. The usual and regular course is to send them in her, in the custody of the prize master, to the place of intended adjudication. This course has not been pursued in this instance. The prize master states that these persons were detained in the war steamer Seminole, in Hampton Roads, where he believes that they now are. He does not know why they were not sent in her, nor does he know any reason why they should not be sent hither for examination.

The papers of the vessel are all here. To send them away would be contrary to the usual course of practice, and would unless under extraordinary circumstances, be objectionable. A commission to take the examinations where the witnesses now are, addressed to a person there, would be inconvenient, as the commissioner would not, without the papers, be able to take the depositions advisedly. The preparation and transmission of copies, besides being attended with delay and expense, might endanger their premature publication. Moreover, a prize commissioner, as the immediate delegate of the judge, ought, if possible, to be a person with whom he can, from time to time communicate, in the progress of the cause.

Another course, which might be preferable, would be to send one of the prize commissioners of the court to Hampton Roads for the purpose of taking the examinations. But

this might be attended with great expense, and, though not necessarily improper, is, I believe, unprecedented.

Under the circumstances of the case, I will make an order that the prize commissioner to whom the papers have already been delivered shall, upon taking possession of the vessel and cargo, deliver them immediately into the custody of the marshal, who will remain in possession under the direction of the commissioner. This will enable the prize master to return with a copy of these proceedings, to the flag officer, under whose order he has brought the captured vessel hither. The flag officer will probably either send the prisoners to this place in the custody of the same prize master, or of another officer, or send an affidavit explaining the reasons for not sending them.

The decision of a prize cause is usually pronounced upon the examination of the persons on board of the captured vessel, and of her papers. In this case there may, perhaps, be some special reason for examining the prize master, who states that he was present at the capture. The commissioner may therefore examine him at once, for which this will be his warrant.

DISTRICT COURT. SEPTEMBER 20, 1861.

ADMIRALTY.

THE ALICE.

1. The general rule in prize cases is to disregard such claims as fall within the definition of liens.

2. But where there was an equitable lien on three-fourths of the vessel for purchase-money in favor of persons who from a period anterior to the civil war had continued in the exclusive and notorious possession and control of the vessel and who were residents of non-hostile States, so much of the vessel as was represented by the lien is not confiscable. It is otherwise as to the remaining one-fourth which was owned by a resident of a hostile State.

3. The order of sale may be molded to the circumstances of such ownership, and the relative perishableness of the vessel from deterioration and daily accruing charges.

PRIZE.

OPINION AND ORDER.

CADWALADER, J.

This case was by consent, heard summarily upon the information, claim and answer and proofs adduced on behalf of the claimants. And it appearing that the facts alleged by the claimants in their said answer are true as therein stated, and the Attorney of the United States admitting the sufficiency of the proofs to that effect adduced, it is considered, adjudged and decreed that there is no cause of forfeiture as to three-fourths of the said vessel, which are registered in the name of the said claimants. As to the other fourth, which stands registered in the name of C. S. Balance, the Court is of opinion that the legal interest continues in him, and is not upon the proofs adduced exempt from confiscability. But, for as much as the claimants, in right of their said lien had been from a period long anterior to the present civil war, and until the seizure on which the present proceedings are founded, still were, in the uninterrupted notorious and exclusive possession and use of the whole of the said vessel including the last mentioned one-fourth, it appears to the Court that their claim to a reimbursement of the amount equitably secured by their said lien should not in the present stage of the cause, be disallowed, absolutely. Upon this point, the Judge remarked that although the general rule in such proceeding, was to disregard wholly such claims as fall within the definition of liens, or even of mortgages, yet he would be unwilling to prejudge the question of the applicability of this doctrine to the present claim of which the peculiarities may be more fully considered in an ulterior stage of the cause. At present he excludes the applicability of the general rule, so far as to decide the other three-fourths exempt from confiscability. The proper course in the opinion of the Court is, if no other claim should be interposed as to this fourth of the vessel, to condemn it after the third default with leave to the claimants to apply, after

the marshal shall have sold the same, for the reimbursement of their lien from the proceeds.

The claimants thereupon showing to the Court that upon the return of the survey and appraisement it appears that the said vessel by reason of daily accruing charges and deterioration in port is incurring expenses and injury which render her in a relative sense perishable, pray an order that three-fourths of her be liberated from custody and discharged, and that the other fourth may be sold by the marshal, and the proceeds paid into the registry of the court, there to abide its future decree, order and direction.

The Court, on consideration, is of opinion that the vessel, is, for the reason aforesaid, perishable, in the sense of that word in which it is properly understood in proceedings like the present, and that the application of the said claimants as to the said one-fourth as well as the other three- fourths, ought to be granted.

CIRCUIT COURT. OCTOBER 26, 1861.

CRIMINAL LAW.

THE UNITED STATES *v.* WILLIAM SMITH.

A merchant vessel belonging to citizens of the United States was captured by an armed vessel sailing under a commission of the Confederate States as a privateer. She was afterwards recaptured and brought with the defendant, who was one of the original captors and had been placed on board of her as prize master, in the first instance into Hampton Roads. After a detention there of several days, they were brought into the port of Philadelphia, where the defendant was committed for trial on the charge of piracy. On the trial the Court charged the jury:

1. That an established government may prosecute hostilities against its enemies in a civil war in like modes as against its foreign enemies in a national war; but that the results of a civil war do not alter its legal character and the enemies of the established government may, when captured, be liable to prosecution in its courts of justice as traitors or pirates.

2. Humane usages in the treatment of such persons, however commendable, are not, in a civil war, founded in any rules of absolute legal right; but are measures of governmental policy.

3. Privateering is recognized by the law of nations; but the commission of a revolutionary government whose existence is not recognized by that

of the United States, can confer no such authority as will change the legal character of piracy.

4. Where the revolutionary government has for a definite period been maintained in peace, it may be a question whether a resident under its dominion may not be exempted from criminal responsibility.

5. Compulsion to operate as a defence for the accused, must be actual force or such threats and intimidation, as placed him personally under a reasonable fear of death or bodily harm. The mere existence of an act of legislation of the revolutionary government under whose authority he resided, requiring military or naval service under pain of banishment or confiscation of property, is not such compulsion.

6. Under the act of 1820 a person first brought into one district, and afterwards apprehended in another, may be tried in the latter district.

INDICTMENT for piracy under act of Congress of May 15, 1820.

Tried before Judges GRIER and CADWALADER.

J. Hubley Ashton, Assistant District Attorney, *George H. Earle* and *Hon. William D. Kelley*, for the United States.

John P. O'Neill, N. Harrison and *George M. Wharton*, for the prisoner.

STATEMENT.

This was the first case of this nature decided in any of the prize courts of the United States, that of the officers and crew of the schooner Savannah, who were on trial at the same time in the Circuit Court of the United States for the Southern District of New York, having resulted in the disagreement and discharge of the jury. The facts of the case admitted of no controversy and need no elaboration beyond the succinct statement contained in the judge's charge. The details are, however, abundantly interesting, and the whole case would appropriately find place in a collection of state trials.

It was argued with great force by counsel for the prisoner that the *animo furandi* was wholly wanting in the offence as proved, and that whether the prisoner were held amenable under the common law or the statute; that the status of a priva-

teersman sailing under letters of marque duly issued by an established revolutionary government could not be distinguished from that of the soldiers of the same government engaged in active service in the field; that both when captured became prisoners of war and were entitled to such treatment and no other as is accorded by the laws of war among civilized nations to prisoners so taken. Authorities of great weight were cited to show that no distinction in this respect existed in the case where the conflict partook of the nature and dimensions of a civil war, and that of a general national war, and the enlightened thought of modern times was invoked and appealed to in support of the argument. The case of the General Parkhill, so recently decided in this district (*ante,* page 479), was cited to sustain the doctrine that the present proportions of the contest were those of civil war as distinguished from mere insurrectionary rebellion and that all governments, including that whose authority was sought to be cast off, were at liberty to treat the revolted insurgents not as mere pirates or outlaws, but as entitled to the same immunities and subject to the same perils, as ordinary belligerents in a foreign war.

It will be seen that the Court while giving effect to this reasoning so far as it relates to usage, and pointing out that the legislative and executive departments of the government are the proper organs for its exercise, decides that the legal rule of the courts of the established government must remain unchanged, at least during the period of active hostilities and before the revolutionary government can lay claim to a peaceable establishment. No one can dispute the correctness of this decision in the present state of the law; but, a broad question remains open, whether the higher ethics of the rule as it exists in international law should not be incorporated into the municipal law. In this age an ultimate conflict in the execution of a sentence in every such case would almost unavoidably arise and the result, probably, would not be advantageous to authority. The present case may be instanced. Smith and the other defendants were

held as prisoners of war and afterwards returned to the Confederate government in an exchange of prisoners.*

CADWALADER, J., charged the jury.

Gentlemen of the Jury, independently of the request of the presiding Judge, this case, from its general importance and specific novelty, might require that the views of each member of the Court on the questions involved should be stated.

One of the witnesses examined on the part of the defence has deposed that in June last, the defendant shipped as one of the crew of an armed vessel called the Jeff. Davis, fitted out as a hostile cruiser against the United States. The defendant's counsel allege, and it is perhaps admitted by the counsel for the prosecution, that she was a privateer, commissioned under letters of marque and reprisal from the so-called Confederate States. The defendant appears to have resided at Savannah, Georgia, where he had followed the business of a branch pilot, and had been a person of good repute. He is entitled here to the benefit of this former good character, and also to that of the testimony which proves the kind treatment by the crew of the Jeff. Davis of their prisoners, while he was on board and afterwards. The same witness has testified that the defendant was a boatswain in this vessel, that he left Savannah for the purpose of joining her in the early part of June last; that he joined her at Charleston, South Carolina, where she then lay, and that he went to sea in her on the 28th of that month from Charleston.

The character and strength of her armament has been described by several witnesses; and some occurrences prior to those particularly charged in the indictment have been proved in order to show that she was cruising for the purpose of capturing merchant vessels of the United States. On

* See The United States *v.* Charles A. Greiner *ante*, p. 448, in which allusion is made to circumstances by the force of which acts otherwise treasonable may become those of a public enemy.

the 6th of July last, according to the testimony (of which you, of course, are the judges), she captured the schooner Enchantress, a vessel owned by citizens of the United States, laden with a cargo which was also the property of citizens of the United States. The facts proved, in order to show that the Enchantress and her cargo were forcibly taken and forcibly detained by her captors, are doubtless fresh in the recollection of the jury. The defendant, as prize master, with four others, was, according to the testimony, placed in charge of her. The place of capture, as one of the witnesses deposed, was about two hundred and fifty miles southeast of Nantucket South Shoal. The Enchantress, in charge of the prize crew, and according to the evidence under the command of the defendant, appears to have borne away to the southward, and after having been at sea till the 22d of July, to have been on that day recaptured off the coast of Carolina by a national armed vessel of the United States. This recapturing vessel was a steamer which took her in tow and brought her into Hampton Roads. The defendant and the others of the prize crew were kept as prisoners on board of this war steamer, which, after anchoring in Hampton Roads, near to Fortress Monroe, went a short distance up the Potomac, returned, and again anchored in Hampton Roads; after which she brought the prisoners, including the defendant, to Philadelphia, where they were taken into the marshal's custody.

This, I believe, is an outline of the whole of the proofs. I have taken full notes of the evidence with great care, and will read the whole, or any parts of it, to the jury, if any one of them, or any of the counsel, request me to do so.

The counsel for the prosecution contend that those who participated in the capture of the Enchantress and her cargo, were guilty of piracy under the act of Congress of 15th of May, 1820, which enacts that any person committing upon the high sea the crime of robbery in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, shall be adjudged a pirate. The

offence thus described in this act is, in the several counts of the indictment, stated in different specific or particular forms, in order to meet alternative aspects in which the case might be presented by the evidence. The indictment also contains an averment showing that the case is within the jurisdiction of the Court under the enactment that the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought.

One of the points of law on which the counsel for the defendant have requested instructions to the jury, is, that this Court has no jurisdiction of the case, because, "after his apprehension on the high seas," he "was first brought into another district,"—meaning the Eastern District of Virginia, —"and ought to have been there tried." This instruction cannot be given. When he was taken prisoner, and was detained in the recapturing vessel, he was not apprehended for trial within the meaning of the act of Congress. His first apprehension for this purpose, of which there is any evidence, was at Philadelphia, after his arrival in this district. Whether he had been previously brought into another district, within the meaning of the act, is unimportant. It has been decided that, under this law, a person first brought into one district and afterwards apprehended in another, may be tried in the latter district. Therefore, if you believe the testimony on the subject, this Court has jurisdiction of the case.

Upon the main question of the guilt of the prisoner, there is, I believe, no dispute that the case would be within the words and meaning of the act of Congress, if the revolutionary proceedings whose character and effect have been discussed, had not occurred, and had not resulted in a civil war. An established government may prosecute hostilities against its enemies in a civil war in like modes as against its foreign enemies in a national war, and for certain purposes, with like effects. For example, vessels captured in the present civil war may be confiscable in prize courts of the United

States, and captured persons may be detained by the United States as prisoners of war. Moreover, in all wars, national as well as intestine, innocent and harmless inhabitants of hostile districts, may, in common with authors and abettors of the war, become involved in its calamities. These results when produced by a civil war, do not alter its legal character. They do not convert it into a foreign or a national war. In a civil war—however organized and systematic the hostilities prosecuted by an established government—its enemies, may, when captured, be liable as traitors or as pirates, to prosecution in its courts of justice. I have recently had occasion to say, and I now wish to repeat, that during civil wars, in which organized hostilities are prosecuted on an extended scale, persons in arms against an established government, captured by its naval or military forces, are often treated, not as traitors or pirates, but according to those humane modern usages which are observed as to public enemies in a national war. They are detained as prisoners of war until exchanged or discharged on parole; or, if surrendered to the civil authorities for trial, are, after conviction, respited or pardoned. Hostile feelings have thus been softened, and measures of retaliation, endangering a revival of obsolete systems of barbarous warfare, have been prevented. But some writers on public law have discussed the subject, as if such civilized modern usages were founded in rules of legal right, rather than in considerations of mere policy. I therefore think it my duty to state that such usages, however commendable, are not, in a civil war, founded in any rules of absolute legal right, but are measures of governmental policy. The question of their observance depends upon the decision of the legislative or executive departments of the government, not upon the opinions of its judicial organs. Thus, courts and juries have, with such questions no proper concern, certainly none that should influence the finding of a verdict. The jury who find a defendant guilty, may, indeed, recommend him to mercy. But such a recommendation, though always respectfully considered, is, in law, no

part of the verdict itself. In finding the verdict, the rules of law should be applied with calmness and firmness, without admitting any qualification of them from extrinsic reasons. If there is any rational doubt of the defendant's legal guilt, the jury should acquit him; otherwise, he should be convicted.

In the arguments of the counsel on both sides, the general question of the lawfulness of privateering, as a method of naval warfare, has been debated. In a national war between independent States, privateering is at present lawful except where it has been abolished by treaty. In such a war a commissioned privateer is to be treated as a part of the belligerent naval forces of the government which has granted the commission. This heretofore established rule of the law of nations, cannot, so far as the United States may be concerned, be changed otherwise than by act of Congress, or by treaty with foreign governments. No law of Congress to this effect has been enacted; no such treaty is in force; and, therefore, neither the executive nor the judicial organs of our government can, at present, rightfully condemn the practice of privateering.

But these remarks apply only to privateering in legitimate war, in which the commissioning government is that of an independent State. The commission of a revolutionary government, whose existence is not recognized by that of the United States, can confer no such authority as will change the legal character of piracy, by merely giving to it the name and form of privateering.

Of the propositions of law upon which the defendant's counsel have requested instructions to the jury, only one has been as yet particularly answered. The others involve the question whether the hostile revolutionary government may not have been so organized and established, in fact, if not of right, as to exempt a resident under its actual dominion from criminal responsibility for acts of submission or allegiance to it, though they may have included a hostile breach of his duty of allegiance to the United States. The

question in another form is, whether the duty of allegiance may not have been so suspended there, as to relieve him of it to the extent required for the purpose of exemption from the guilt imputed in this indictment.

The law might be as the counsel have stated it, if either of two additional statements could be made: First, if the Government of the United States had been superseded by a local government, which, though it had originated in a hostile revolution had, for a definite subsequent period, been established and maintained in peace; or, secondly, if the defendant, though such a government had not been thus peaceably established and maintained, had been impressed into the hostile service of the revolutionary government, and compulsorily detained in such service. As to the first of these two points, the difficulty in the way of the defence is, that the Government of the United States has not been subverted, and that its authority in the hostile districts, if suspended, or at present superseded is not superseded by that of a government which has at any time been peaceably established, much less by one which has been maintained in peace. The government of the States now confederated for purposes hostile to the constitutional Union, was not organized without a contemporaneous outbreak of civil war. This war has been continued without interruption. The contest has been on their part a war against an established government, to which they owe allegiance. So long as this government exists, and the contest is maintained, the peaceable establishment of the revolutionary government cannot be asserted.

As to the other point—I mean the question of compulsion —the defence has not been sufficiently made out in law. The mere fact, if it were proved, that by an act of legislation of the revolutionary government, under whose power the defendant resided, military or naval service was required of every such resident, under pain of banishment, or confiscation of property, would be no justification or excuse. Unless actual force was exercised against him personally, or threats and intimidation placed him personally under a reasonable

fear of death or serious bodily harm, the allegation of compulsion cannot be sustained. If he was, at first, impressed forcibly into the hostile service, the inference might be that his detention in it was afterwards compulsory, so long as he remained on board the armed vessel in which he was a subordinate. But any such favorable inference would, even in that case, be rebutted by the proof that, as prize master, he afterwards remained in the hostile service when he was no longer a subordinate. The consideration of this point is, however, not necessary, because there is no sufficient proof that he did not at first engage voluntarily in the hostile service.

The propositions of law stated by the defendant's counsel must, for these reasons, be answered negatively.

The jury retired, and after an absence of three-quarters of an hour returned and rendered a verdict of "guilty."

The record shows, that a motion for a new trial and in arrest of judgment was made, but never argued or pressed.

Afterwards, the defendant, with the others who were tried and convicted on the same charge, were brought into court by the United States Marshal in return to a writ of habeas corpus; whereupon the District Attorney moved that they be remanded respectively to the military custody from which they passed into their present custody.

And every one of the defendants stating severally in open court that he had no objection to being thus remanded to military custody, leave is given to the marshal so to remand them.

ADMIRALTY.

THE ENCHANTRESS.

1. A vessel belonging to loyal owners, captured by enemies at sea, and again recaptured, continues to be the property of her former owners subject to the operation of the charter party; but she is also within the admiralty jurisdiction of the Court and, therefore, liable to the ascertainment of claims for salvage.

2. After the capture, upon the appearance of the recaptors, a mariner, one of the original crew who had been retained on board, threw himself into the sea and conveyed information which led to the recapture. *Held*, that he was entitled to salvage.

ORDERS AND OPINIONS.

Case of the schooner Enchantress. Mentioned in the preceding case as the subject of the capture by the defendant Smith and others.

CADWALADER, J.

The recaptured vessel the Enchantress continues to be the property of her former owners subject to the operation of the charter party. The respective shippers of the cargo are said to have dealt with the charterer as if she was a general ship in which their respective adventurers were to be carried under ordinary contracts of affreightment. They are supposed to be residents all, or most of them, of Boston, or some other place or places at which they can be communicated with by telegraph or promptly by mail. Under such circumstances, I do not think they should be debarred after the delay and interruption of the voyage from an opportunity of making any suggestion by which they may think that their respective interests would be promoted. At all events I think that without some proof of notice to them, an examination of the papers in particular detail and perhaps a survey of the cargo should precede any absolute order delivering the vessel and cargo to the master for the prosecution of her originally intended voyage. The vessel should however, pass into the possession of the master for the purpose of preparing her for sea so far as this may be done consistently with such custody by the marshal as may preserve the Court's control of her and of her cargo till a final delivery of her to the master. It is said that four days will be required in order to prepare her for sea. During that period the necessary notices can be given to the charterer and respective shippers.

A monition requiring the captors and others to present

within five days their respective claims for salvage, if any are to be presented, should also be issued.

The clerk will issue such a monition directing service of it to be made on the prize master on board of the Albatross, and will also make out an order that the marshal permit the master, John Devereux, to do all that may be necessary for preparing her for sea, with leave to apply for the appointment of another master for the purpose aforesaid.

Mr. Henry moves for leave to amend the claim heretofore allowed by adding a prayer that the said schooner with her cargo be delivered up to the said master for the resumption and prosecution of the voyage in which she was engaged when captured and that this their petition may be deemed and taken to be such a prayer.

Which is allowed accordingly.

DECREE.

I, JOHN CADWALADER, Judge of the District Court of the United States in and for the Eastern District of Pennsylvania, duly authorized under the Constitution and laws of the United States to hear and determine in the said district all causes and complaints as to ships or vessels and goods, etc., seized and taken as prize, including cases as well of recapture as of capture, etc., having heard and considered the merits and circumstances of a certain cause or proceeding respecting the recapture of a certain schooner called the Enchantress, whereof John Devereux was master, her tackle, apparel and furniture, and the goods, wares, and merchandise laden on board of her; And it appearing that on the high seas on the sixth day of July last the said vessel and her cargo aforesaid, had been captured by enemies of the United States in the civil war against their government, theretofore and then and now pending, and had then or shortly afterwards been placed by the said hostile captors in the custody of some of them to be carried into some hostile port or place in whose custody the same continued until the recap-

ture hereinafter mentioned; and that while the same so continued in their custody, and before they had reached any port or place on land, the said schooner and her cargo, and the said hostile persons on board of her were by the United States war steamer Albatross, whereof George A. Prentiss, Esquire, of the Navy of the United States, was master, on the high seas, recaptured and brought into the port of Philadelphia, in the district aforesaid for adjudication, which cause or proceeding was lately and still is depending before me. And George A. Coffey, Esquire, Attorney of the United States in and for the said district, and proctor for the officers and crew of the said steamer Albatross, having by libel allowed in the said proceeding, demanded and prayed that a just and reasonable salvage should be adjudged to the said recaptors and Jacob Garrick, a mariner on board of the said schooner Enchantress at the time of her said hostile capture, on the sixth day of July last, who had by the said hostile captors been forced to remain on board of her, and who on the said twenty-second of that month had, before the said recapture, in order to promote and facilitate the same, thrown himself into the sea, and having been taken up in the life-boat of the said steamer Albatross, had been on board of her at the time of the said recapture, having by petition or libel allowed in the said proceeding prayed that an adequate and reasonable proportion of salvage be awarded and adjudged to him. And Benjamin Davis, Jr., part owner of the said schooner, as well on his own behalf as on behalf of the other part owners, namely E. M. Read, Richard Plummer, Eben Manson, I. B. and T. Atwood, J. B. and W. Creasey, Ezekiel Evans, John T. Page, and Atkinson and Stanwood, of Newburyport, in Massachusetts, and the above named John Devereux, of the same place, master as aforesaid of the said schooner, having in and by a certain claim allowed in the said proceeding intervened and prayed restitution of the said vessel and her cargo to her said master for the resumption and prosecution of the voyage in which she was engaged at the time of the hostile capture aforesaid. And it appear-

ing on examination of the charter party and other papers on board of the said schooner that the respective shippers of her cargo had probably dealt with the charterer as if she was a general ship, in which their respective adventures were to be carried under ordinary contracts of affreightment and that they were all, or most of them residents of Boston, or some other place or places at which they could be communicated with by telegraph, or promptly by mail, and that five days would be required in order to prepare her for sea, it was ordered by the Court aforesaid on the ninth day of August, 1861, that the marshal should permit the said master to do all that might be necessary for preparing the said vessel for sea, so far as this might be done consistently with a retention by the marshal of such custody as might preserve the Court's control of the vessel and cargo, the Court intimating an opinion that after the delay and interruption of the voyage which had occurred, the said shippers ought not to be debarred of an opportunity of making any suggestion by which they might think that their respective interests would be promoted or at all events that without some proof of notice to them as to the major part of them, an examination of the papers in particular detail, and perhaps a survey of the cargo should precede any absolute order delivering the vessel and cargo to the master for the prosecution of the said voyage. And afterwards, on the twenty-second day of August, 1861, Mr. Henry, proctor of the said claimants, appearing on behalf also of the following named persons, that is to say, John L. Priest, the charterer, who was one of the shippers, and Cotton & Haley, Winter, Dupee & Co., Isaac Stickney & Co., The Boston & Sandwich Glass Company, H. Jacobs & Son, William Jackson, George H. Gray and Danforth, and William H. Greeley, who so far as is known are all of the other shippers except two, and stating that none of those whom he so represents and no other persons so far as he knows or believes, objects to the resumption and prosecution of the said originally intended voyages, and that he, the said proctor, is ready and willing on behalf of the parties in-

terested to pay forthwith the costs and charges of the said proceeding and such salvage, if any, as may be awarded in order to obtain the liberation of the said vessel and cargo, the cause was finally heard and adjudged upon the allegations, proofs and arguments. And the same having been considered, it is upon mature deliberation, ordered, adjudged and decreed, that there is due for salvage to the recaptors (including the said Jacob Garrick) the sum of $1,500 for their services rendered in the said recapture, and that in the distribution thereof the said Jacob Garrick do and shall receive the same part or proportion as if he had been one of the crew of the said steamer Albatross. And it is further adjudged and decreed that on the payment within three days hereafter into the registry of the court of the said sum of $1,500 and all the costs and charges of the said proceeding to be taxed and ascertained by the clerk of the court, the said vessel and her cargo be liberated from the custody of the marshal and be by him delivered to the said master, John Devereux, as her navigator for the purpose aforesaid and that in case the said payment shall not be so made unto the said registry, the clerk of this court shall ascertain and report the amounts of the said salvage compensation, and costs and charges assessable upon the said vessel and cargo respectively in the proportion of the values thereof to be by him ascertained, and a question thereupon arising whether the amount of the freight for the voyage which had been commenced, and is to be resumed as aforesaid, should be added to the value of the vessel, so that her value with this addition might constitute a contributory sum in the said apportionment, the court is as of opinion, that although the said freight, if hereafter earned should in respect of the said cargo on board, be so added in any settlement or adjustment afterwards made, yet such freight, unless, and until, it shall have been earned cannot properly be so taken into account. Wherefore it was considered and adjudged that the present apportionment should be made upon the respective values of the vessel without addition for freight, and the cargo.

DISTRICT COURT. OCTOBER 28, 1861.

ADMIRALTY.

THE UNITED STATES *v.* HORSES.

When the seizure is on land the burden of proof of hostile ownership and of destination to a hostile district, is on the United States.

PRIZE.

CADWALADER, J.

I am of opinion that in this case the seizure having been on land the burden of proof is on the United States, and that the proof is insufficient on their part upon each of the two points of alleged hostile ownership and of the alleged destination to a hostile State or district, and consequently that the prosecution cannot be maintained upon the statute on which it is founded. The claimants praying by their counsel in open court a simple decree of restitution without any order on the subject of costs or charges. It is ordered that the property seized be liberated from custody and restored to the claimant.

DISTRICT COURT. NOVEMBER 1, 1861.

ADMIRALTY.

THE SALVOR.

1. In prize cases it is the duty of the naval captors who send a vessel into port for adjudication to send also a sufficient number of the persons taken in her, including, in ordinary cases, the master and mate, for examination.

2. When captured vessels are brought into port, the care and custody of prisoners and persons brought in for examination, is not judicial. It is military and not civil unless they are charged with a criminal offence and surrendered under it.

3. Duty of prize masters.

4. Special order when cargo is perishable from different causes.

PRIZE.

Letter from Commandant of Naval Station.

OPINION AND ORDERS.

CADWALADER, J.

In this case I have received a letter from the commandant of the navy yard at this station, on the subject of the persons on board of this vessel, whom he designates as prisoners and passengers. Though epistolary communications to courts of justice are always inconvenient, and in most cases, irregular,* an occasional exception must be allowed in transacting the peculiar business of prize courts. I have therefore directed that this letter be filed. The commandant asks me for some directions as to his disposal of these persons. I can, of course, give no direction as to the mode in which officers of the naval service are to follow its rules concerning the custody and treatment of their prisoners, though, in the case of a prize, I might entertain a complaint of irregularities of certain kinds in these respects.

In prize cases, the duty of the naval captors who send a vessel into port for adjudication, requires them to send in a sufficient number of the persons taken in her, including, in ordinary cases, the master and mate, as witnesses for examination. In some cases, actual or nominal passengers are the most important examinants. Few really contestable cases occur in which the examinants are too numerous. They are not unfrequently too few; and they have, in some cases, been persons of too inferior grade to satisfy the requirements of the judicial investigation. A neglect of the fulfilment of this duty, not less than improper treatment of captured persons, may be the subject of judicial consideration, affecting questions of prize money, and of costs, and sometimes involving questions more serious.

Officers of the naval service have occasionally fallen into the mistake of supposing that when captured vessels are brought into port and pass into judicial custody, the care and custody of the prisoners or persons brought in for ex-

* See 1 Addams, 305 to 307; 1 Macn. & G. 121, 122, 125 to 128; 1 Hall & T. 290, 291, 294, 295, 298, 299; 13 Jurist, 860.

amination becomes judicial. This impression is, in a general sense, erroneous. The custody, unless they are surrendered under some criminal charge cognizable by the judicial authority of the district, continues to be military, and cannot be interfered with by the Prize Court except for the purpose of securing the examination of the witnesses. So, after their examination has been completed, their custody, if it continues still military, and not civil, unless they are charged with a criminal offence, and surrendered under it. Whether persons not thus charged should be detained in military custody after they have been examined, is often a question of great public interest, and may be attended with serious difficulty. But this question does not concern the Prize Courts. It is for the consideration of the prize master, or of the superior naval officer of the station.

On a former occasion I made some remarks, of which the substance was written out, and formed the basis of a subsequent communication from the Assistant Attorney of the United States for this district to the Attorney General. What I then said I now repeat, as follows:

"When a captured vessel is brought into port for adjudication, and passes into judicial custody, the prize master or other naval commander retains the custody of the prisoners until, according to the rules of the naval service, they are discharged, or transferred into close custody, as the public interest may require. Sometimes the prisoners are merely persons detained for examination as witnesses. That they are brought in and are detained for this purpose alone, does not prevent them from continuing in *naval* custody. Sometimes these persons cannot be discharged with humanity, because they might starve for want of means of present support in a strange place. In other cases, they are so far dangerous from possible hostile relations, that, though perhaps not liable to detention as close prisoners, their premature liberation would be imprudent. The duty devolves upon the Government, but not upon its judicial department, to provide for their support while in port. If the expenses of their

comfortable subsistence are not defrayed by the local disbursing agent of the naval department of the Government, and they are consequently discharged, their discharge cannot be prevented by the Prize Court. This court might, if they were thus discharged before the completion of their examinations, direct an allowance to them of $1.50 per day each, as witness money. But this allowance would only be made for the time, seldom exceeding a single day, of their actual detention for examination after their discharge from naval custody, and would not absolve the naval custodian from responsibility for their premature or improper discharge, or for want of proper care of them before and afterwards.

"An incidental subject of less importance, though not unimportant, is that the prize master and his crew usually incur incidental charges which cannot be repaid by the marshal or other officer of the judicial department until after the condemnation and sale of the captured property. Such expenses ought to be promptly reimbursed as other current local expenses of the naval station to which the prize may be brought. The officer defraying them can, in proper cases for a reimbursement, obtain it after condemnation out of the proceeds. This, if a condemnation ensues, can, on behalf of this officer, be attended to by the Attorney of the United States, who, in proper cases, is always ready to render such incidental services on request. Pilotage, towage and canal charges, are examples of such expenditures as may be thus incurred by persons entrusted with the safe delivery of a prize vessel into the hands of the judicial officers of the Government. Such charges are not, like the wharfage, etc., incurred *after* delivery into judicial custody, payable by the marshal. I have been told that in some judicial districts of the United States, the marshals are in the habit of paying such prior charges. This may be very proper where they may choose to act for the purpose as disbursing agents of the proper executive department of the Government, and are employed for the purpose. But it is not a part of their offi-

cial duty as marshals, or a subject within any direct cognizance of the Prize Court before condemnation."

The question how far the military duty of protecting a prize in the port of adjudication, continues to rest upon the prize master and his crew, after she is in the marshal's official custody for civil purposes, arose in a case in which some of the prize crew had deserted in this port. The case was that of a recaptured vessel. The question was whether the deserters had forfeited their shares of salvage decreed. If no such duty of protection continued, their shares were not forfeited by such subsequent misconduct. The case was argued on the question whether the duty did not continue so long as they remained in the port of adjudication, and had been assigned to no other incompatible naval duty. The case remains under consideration. A similar question as to prize money might arise in the case of a captured vessel. The distinction between cases which thus concern the vessel, and the case of prisoners, is, that prisoners do not pass, as the vessel does, into the custody of the Prize Court. However, therefore, the case to which I have referred, of the deserters, may be decided, the case of prisoners is free from doubt. It would be easy to state cases in which their military custody might be required for the safety of the country. The rule must be uniform in all cases.

The clerk of the court will send a copy of this to the naval commandant. The District Attorney informs me that he has no criminal charge to prefer against any of the prisoners. The prize commissioner has not, as yet, made his report. But he informs me that he has completed his examinations of the witnesses who were brought in the vessel. The libel was filed and allowed yesterday, when the vessel passed into the legal custody of the marshal. The business of the court, therefore, does not seem to require the longer detention of any of the persons in question. Their discharge or detention rests with the officers of the naval service, according to its rules.

ORDER.

THE following ORDER was subsequently made in this case:

And now 25th March, 1862, the Court upon considering the report filed this day of the commissioners Brenner, Warburton and Raisin, and the former report and evidence, said: I think that the whole of the cargo should be sold as perishable, the portions as to which doubt might otherwise exist being liable if separated from the residue to incur charges by which their value would be absorbed and being, therefore, perishable by reason of such chargeableness. The marshal will of course follow his usual practice in the case of sales of property not condemned, of not disposing of it at inordinate sacrifice. The several appraisements in this case appear to have been very carefully made.

I order the sale of the whole cargo as perishable.

CIRCUIT COURT. NOVEMBER 12, 1861.

CRIMINAL LAW.

THE UNITED STATES *v.* PERRY AND OTHERS.

On an application for a continuance in a prosecution for an offence committed at sea, it is not necessary that the affidavit should set forth the evidence.

INDICTMENT of thirty-five persons, crew of the ship Petrel, for piracy.

APPLICATION FOR CONTINUANCE.

CADWALADER, J.

Yesterday, in the case of an indictment against several persons for a treasonable attack upon the steamer St. Lawrence, of the Navy of the United States, the counsel of the United States, proposing to try some of the defendants jointly, stated that the trial could not be commenced before Friday next, assigning as the reason, the absence of a witness who is in the naval service. They said that his absence

had been the subject of correspondence with the Navy Department since the 11th of October; that two letters from that department, dated the 15th of that month and 5th of the present month, had been received; that the arrival of the witness was expected hourly; that if he were present, the trial could be proceeded with at once on the part of the United States; that his testimony could be supplied by that of another witness who was in attendance; and that the only reason for a delay till Friday was that, under the act of April 30, 1790, three days' notice of the name of the latter witness must be given before the trial.

The counsel for these defendants moved for a continuance until the next term, upon an affidavit of the absence of another witness—the naval officer who was in command of the St. Lawrence at the time of the occurrence in question. The affidavit stated in substance that he was a material witness for the defendants, without whose evidence they could not safely go to trial, and that they were not aware that the facts which they expected to prove by him could be established by any other testimony; that in consequence of his absence, ever since the indictment was found, from his "having been sent out by order of the Government," it had been impossible to serve a subpœna on him, and that they expected to be able to obtain his attendance at the next session of the Court.

The absent witness for the prosecution is not in attendance to-day. But this does not affect the question upon the motion for a continuance on behalf of the defendants, as I would, if I refused the continuance, postpone the trial until Friday next, as requested by the counsel of the United States. I proceed, therefore, to give my opinion upon this application for a continuance:

Under the twenty-ninth section of the act of 30th April, 1790, and sixth section of the act of 2d March, 1793, a subpœna, whether issued on behalf of the defendants or of the United States, would have "run" in this case into any part of the United States. The limitation of one hundred miles

from the place of trial applies only to witnesses in civil suits, and in criminal cases in which the defendant, *in forma pauperis*, obtains a subpœna under the eleventh section of the act of 8th August, 1846. Perhaps, therefore, this affidavit might have been insufficient, if the witness had not been on duty as a naval officer, under orders of the Government, at a period when the service of a subpœna would have been ineffectual, if not improper.

The government of a nation actively engaged in a civil war must often be unable to prosecute criminal charges against prisoners captured by its naval or military forces. Reasons of state which may induce a politic or humane forbearance till the termination of active hostilities, are not proper subjects of judicial consideration. But a practical truth which must be considered here, is, that the witnesses who know the facts in question are likely to be engaged in prosecuting hostilities where the mandate of a subpœna cannot be obeyed. The Government, it is true, may detach such witnesses from their military or naval duties for the purpose of their attendance upon the criminal courts. Where the Government can do this alike for the defence and for the prosecution, and can permit the attendance of the witnesses to continue as long as may be properly required, the ordinary course of criminal justice can be pursued in such cases. But how difficult this may be in a season of active war appears in the present case. The subpœnas on behalf of the United States were issued in September last. The officers of the law and navy departments have been for a month in correspondence as to the attendance of a witness for the prosecution; but there is no offer on the part of the Government to obtain the attendance of this witness for the defendant. No such offer could be expected, except under peculiar circumstances. But without it, the opportunities for commanding the attendance of witnesses are on one side only. I, therefore, think that the non-attendance of this officer has been sufficiently explained; and that if he is to be regarded as a material witness, the defendants ought not to be de-

prived of an opportunity to serve a subpœna upon him hereafter, when his obedience to it may consist with his public duty, or may be sanctioned by the Government.

The only doubt which I have had is whether the materiality of his testimony appears sufficiently in this affidavit. The rule of practice on the subject, in this court, is not that which now prevails in England, or in our sister States, or even in Pennsylvania if it has here undergone the recent changes which have been mentioned in the argument of the present question. Under the 34th section of the Judiciary Act of 1789, the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require, must, in civil suits at common law, be the rules of decision in the courts of the United States, in cases to which they apply. But, according to the case in 12 Howard, 361, which was decided in conformity to the opinion of Marshall, C. J., in 2 Burr's Trial, 481, the rules of proceeding in criminal cases in the courts of the United States are those which were established in the respective States when the Judiciary Act of 1789 was passed. Our guide, therefore, in deciding the present question should be the practice which prevailed in Pennsylvania at that period. The rule on this point was not then more strictly defined than the English practice, as it was fully stated and explained in the year 1764 in the Chevalier D'Eon's Case (3 Burrow, 1513, better reported in 1 W. Bl. 510). In that case the defendant swore only to a hope and expectation that the attendance of the absent witnesses could be obtained at the next term. Though he swore that they were material, it appeared that they had not been at the place where the act in question was charged to have been committed. His affidavit was, therefore, adjudged insufficient. Yates, J., said "Two rules are necessary to be observed. 1. The evidence must be material. 2. That it may be attainable. 1. The Court will *not drive the defendant to disclose what the evidence is.* But though he swears the man is a material witness, that oath is not conclusive. If the other side can show it impossible, . . . that will

counterbalance his oath." Lord Mansfield said: "If the *usual form* of affidavit is observed, and there is no special ground of suspicion, the rule goes, *of course*. But, if there be such ground, it is refused, *unless the party will go into further and minuter circumstances*." Formerly, the practice in the criminal courts of Pennsylvania was to require, at the first term, no particular or general statement in the affidavit of the circumstances to be proved. The most that was required was a statement that the witness was present at the occurrence in question, or at some occurrence connected with it, or had some other means of knowledge on the subject. I doubt if even this was usually insisted upon at the first term, though, perhaps, it may sometimes have been required, when thought necessary in order to prevent imposition upon the Court. In the present case, the witness was not only present, but was the principal person on board. It would very seldom be safe, as to occurrences in a vessel at sea, to attempt before a trial, any such discrimination as would stamp the testimony of a witness who was on board as immaterial. The legislation of the United States indicates a purpose to extend, rather than restrict, the facilities of defendants in criminal cases in obtaining evidence. The act of Congress of 23d August, 1842, § 2, gives a discretionary authority to the judge or commissioner, at a preliminary hearing, to require a recognizance, with or without sureties, for the attendance, at the trial, of witnesses for the defendant, as well as of those for the United States, in all cases where a crime or offence is charged to have been committed *at sea*. It is true that the seventh section of the act of 8th of August, 1846, which gives in other cases, a somewhat similar discretionary authority to a judge as to witnesses on behalf of the United States, in *all* criminal cases, does not give such an authority as to witnesses for a defendant. But the difference in this respect, where the offence is charged as having been committed *at sea* shows a legislative discrimination, of which the reasons cannot be doubtful. In the case of occurrences at sea, not only are the means of obtaining and securing the attendance of witnesses

precarious, but none of those on board of the vessel in which they happened are, under ordinary circumstances, likely to be ignorant of everything that may be material. To decide now that the witness cannot be a material one for the defendants would prejudge a case in which the punishment is death, and assume their guilt without trial.

I, therefore, will grant the application for a continuance, unless the counsel of the United States can inform the Court that they expect to be able to secure the attendance of this witness within a reasonable period, for the prolongation of the session of the Court.

DISTRICT COURT. NOVEMBER 26, 1861.

ADMIRALTY.

THE AMELIA.

1. During the civil war the United States were not at war with literature; therefore, books shipped by a resident of a hostile district, but not for commercial purposes, were not liable to confiscation as prize.

2. Persons sent in a prize ship for examination are not subject to the order of the Court. The principle of "The Salvor," (*ante*, p. 531), affirmed.

3. The destination of a vessel was to a blockaded port; but the voyage was undertaken in ignorance of the blockade, and no attempt was made to violate it. *Held*, that the vessel and cargo were confiscable so far only as they belonged to enemies of the United States.

4. Non-claim for a period of more than eight months from the capture, with the absence of proprietary documents, justifies an order of sale for the unclaimed portions of the cargo.

5. Formula of decrees.

PRIZE.

OPINIONS AND DECREES.

CLAIM of MITCHELL KING, of Charleston, South Carolina, for two cases of books marked "The University of North Carolina, Chapel Hill, North Carolina, care of Mitchell King, Esq., Charleston, South Carolina, Nos. 1 and 2," received and filed on the 14th instant, with the written consent of the

District Attorney of the United States. And the affidavit of John Penington, taken on the 16th instant, and this day filed, being read by consent, and the letter of the said claimant therein mentioned being put in evidence, and it appearing to the Court that other parts of the said letter than are extracted in the said affidavit should be considered in forming an opinion as to the sufficiency of the authority conferred upon Mr. Penington to receive the said two cases of books, the said letter is filed of record. And the said claim having been considered upon the above mentioned papers, and upon the documents on board of the captured vessel.

CADWALADER, J.

Though this claimant, as the resident of a hostile district, would not be entitled to restitution of the subject of a commercial adventure in books, the purpose of the shipment in question, gives to it a different character. The United States, in prosecuting hostilities for the restoration of their constitutional authority, are compelled incidentally to confiscate property captured at sea, of which the proceeds would otherwise increase the wealth of that district. But the United States are not at war with literature in that part of their territory. The case of the pictures of the Philadelphia Academy of Fine Arts, liberated by a British Colonial Prize Court in the war of 1812, the prior proceeding in France mentioned in the report of that case, and the French and other decisions upon cases of fishing vessels, are precedents for the decree which I am about to pronounce. Without any such precedents, I would have had no difficulty in liberating these books.

Whereupon, it is ordered, adjudged and decreed, that the said two cases of books be liberated from the custody of the marshal and delivered to the said John Penington.

A LETTER was received in this case from the prize master which was as follows:

Eastern District of Pennsylvania.
In the U. S. District Court.

To the Hon. JOHN CADWALADER,
Judge of said Court:

The undersigned begs leave to report, that about one o'clock, P. M. of Saturday, 29th June, 1861, he gave the possession of the ship Amelia, of which he has been prize master, to the marshal of this district, and has since that time aided him in the custody and safe keeping of the said ship and her cargo; and that he has allowed all the persons sent with him on the ship to this port, viz., the captain, his wife, the cook and his wife and daughter, to go ashore, for their greater comfort, there being no conveniences for them on board the vessel; and each and all of them remaining willingly, subject to the orders of the judge of this court. (Signed),

Acting Master, JOHN W. BENTLEY,
U. S. Navy, and Prize Master of ship Amelia.

Philadelphia, 1st July, 1861.

BY THE COURT:

The prize master is mistaken in supposing that the persons mentioned in the above statement are subject to the order of the Court. On the contrary, they are in custody of the naval captors, unless they have been duly discharged. The Court cannot interfere to direct their discharge. But if the commissioner of the court and the prize master concur in opinion that there is no reason for their longer detention, the Court cannot perceive that their discharge would be censurable. This, however, is a matter for naval, and not for judicial regulation.

The prize master, stating that his duties may require him to leave Philadelphia, the Court add, that so soon as the persons in his custody shall have been discharged, or their custody otherwise regulated by the proper naval authority, the Court perceive no necessity for his remaining here longer. But so far as naval duties may be concerned, the

prize master will, in this respect, judge for himself what should be his course of conduct.

DECREE.

I, JOHN CADWALADER, Judge of the District Court of the United States for the Eastern District of Pennsylvania, duly authorized under the Constitution and laws of the United States to hear and determine in the said district all causes and complaints as to ships or vessels, and goods, etc., seized or taken as prize, having heard and considered the merits and circumstances of a certain cause or proceeding respecting the seizure of a certain ship called the Amelia, whereof John M'Kensie was master, her tackle, apparel and furniture, captured as prize by the steamer Union of the Navy of the United States, under command of Captain John R. Goldsborough, and brought into the port of Philadelphia in the said district, which cause or proceeding was lately and still is pending before me; And it appearing that the said capture was made on the high seas, off the harbor of Charleston, in the State of South Carolina, on the 18th day of June, in the year 1861, at and before which time civil war existed between the United States and the inhabitants of the said State of South Carolina and other persons confederated for hostile purposes against the United States, by reason whereof the judicial tribunals of the United States for South Carolina were closed and could not be kept open, nor could the laws of the United States be executed by their officers and ministers of justice, or otherwise peaceably enforced or executed within the said State, and that Charleston aforesaid was, at and before the capture aforesaid, in the hostile occupation of enemies of the United States in the said civil war; And George A. Coffey, Esquire, Attorney of the United States in and for the said Eastern District of Pennsylvania, having by libel, allowed in the said proceeding, alleged that at the time of the said capture the port of Charleston aforesaid was blockaded by said forces of the United States, and that the said ship when captured was attempting to violate the said

blockade, and having further in the said libel alleged that the said ship, her tackle, apparel and furniture, and the said goods, wares and merchandise were the property of insurgents, traitors and public enemies, and were for the reasons aforesaid or otherwise, liable to confiscation or condemnation as lawful prize; And the said John M'Kensie, master as aforesaid, having in and by a certain claim intervened in the said proceeding for the interest of himself, George Agry and James Welsman (described in said claim as John M'Kensie, a native of Hull, in Yorkshire, England, naturalized as a citizen of the United States at Charleston aforesaid, in the year 1851, George Agry, of Hallowell, in the county of Kennebec, and State of Maine, a citizen of the United States, James Welsman, of Charleston aforesaid, a citizen of the United States), and making claim of the said ship, her tackle, apparel and furniture, and alleging that he, the said John M'Kensie, was, as master, in possession thereof at the time of her said capture, and that the said John M'Kensie, George Agry and James Welsman, before, at and from the commencement of the voyage in which she was captured as aforesaid, until and at and from the time of her said capture were and still are the owners of the said ship, her tackle, apparel and furniture in the following proportions, to wit: the said George Agry of two-eighths parts, the said James Welsman of five-eighths parts, and the said John M'Kensie of one-eighth part thereof, to whom and to no other persons, the same do, and will, if restored, belong in the said shares and proportions, and praying the liberation of the same, and restoration thereof to him for the said alleged owners, and the condemnation of the captors in damages and costs, and the cause having been heard upon the said libel and claim, and upon the papers, proofs and examinations, and it appearing that the said vessel, at the time of the said capture was destined to the said port of Charleston, which was then effectively blockaded by the naval forces of the United States, but there not appearing to have been any such notice of the said blockade as to render her confiscable by reason of such

destination alone, and no breach of the said blockade after knowledge thereof appearing to have been committed or attempted by those navigating her, the Court was of opinion that upon the question of breach or attempted breach of blockade she was not confiscable; but upon the question of hostile ownership, it appearing that the said ship, her tackle, apparel and furniture were at the time of the said capture the property of enemies of the United States in the said civil war, the Court afterwards, on the sixth day of September, in the year 1861, by interlocutory decree pronounced the same to be as such or otherwise confiscable, and therefore condemned the same as good and lawful prize, and on the application of the said Attorney of the United States ordered that the said ship, her tackle, apparel and furniture be publicly sold by the marshal, according to the course and practice of the Court and that the proceeds of the sale be brought into the registry of the court, to abide its order and direction.

OPINION AND DECREE.

In the matter of the unclaimed portions of the cargo of the Amelia:

The prize commissioner, having as to the unclaimed portions of the cargo of this vessel, made his report under the Court's general order of 22d January, 1862, and the Assistant District Attorney of the United States praying judgment of condemnation of the same, the Court having considered the said commissioner's report and the preparatory proofs and papers in the cause, said: The evident character of the ownership of all such parts of the cargo as are fully documented makes this a proper case in respect of them, for a judgment of condemnation without the delay of a year, which in cases of non claim might otherwise be proper. As to the residue of the cargo the same course would, according to the former practice of prize courts, have been considered regular and proper on account of the absence of proprietary documents. I do not apply with rigor the former rules of proceeding under this head, because, in the case of sailing vessels, the

proprietary documents of particular shipments are, in time of peace, very frequently sent by steamers, that they may be at hand before the arrival of the shipments. This practice is not to be encouraged so as to sanction its continuance during such relations as now unfortunately exist between the United States and the inhabitants of certain States of which South Carolina is one. But the date of the voyage in which this vessel was captured makes an exception in favor of shippers of undocumented parts of the cargo proper to *some* extent. The question is to *what* extent. I do not think that there is any reason for so long a delay as that of a year. The reason for the indulgence in this case for example is founded upon an assumption that the missing papers, if the property were in persons entitled to claim, would long before this time have been so forwarded that they could have made their claims.

The non claim for so long a period with the absence of proprietary documents therefore makes a decree of condemnation of these as well of the other unclaimed portions of the cargo proper. Therefore, the clerk will enter a decree of condemnation of all unclaimed portions of the cargo. But no writ of sale will issue until the return of the re-survey and appraisement which has been ordered.

DISTRICT COURT. DECEMBER, 9, 1861.

ADMIRALTY.

THE CECILE.

When a discretion to order the sale of a vessel may be exercised, an hypothecation may be ordered.

REPORT of commissioner upon petition for order to hypothecate vessel for accruing charges.

CADWALADER, J.

Whether all of the accruing charges mentioned by the commissioner should be taken into account or not, enough

appears to show that an amount is accruing which would render the detention of the vessel in port ruinous to those interested in her. The case is one in which testimony from a distance will probably be taken under a commission, and if the application had been for a sale I would have considered the vessel perishable in the sense in which this word is applicable in admiralty proceedings to vessels idle in port. As I would thus have had authority to decree a sale, my jurisdiction is properly exercisable in making the order prayed for a mere hypothecation.

And Edmund A. Souder presenting himself in open court to enter stipulation for the release of the said vessel, and being willing to accept hypothecation thereof in the shape of a bottomry bond in $1,008, whereof $840 is principal and $168 marine interest, and Ely M. Boggs, master of the said brig Cecile, praying to be allowed to hypothecate the said brig, her tackle, apparel and furniture to the said Edmund A. Souder in the amount aforesaid to indemnify him for entering into the stipulation required, in order to obtain the release of the said vessel. It is ordered that the said master have leave to execute such bottomry bond accordingly.

DISTRICT COURT. JANUARY 2, 1862.

ADMIRALTY.

THE MEACO AND OTHER PRIZE CASES.

1. In a general national war between independent governments the hostile character of vessels must be the same whether the voyage has been begun before or after the commencement of the war. But this is not invariably true in the case of a civil war.

2. In such a war where the voyage was begun previously to hostilities an equivalent for wages may be allowed out of a fund which would not have existed if the voyage had not, so far as the mariners are concerned, been substantially completed.

3. The question of wages can seldom arise in a prize court.

4. An allowance out of the proceeds of the cargo may be made to subjects of a foreign power, not residents of the United States, except for commercial purposes, for advances made and charges incurred by them, when

the legal title to said cargo is in such persons, as security for said advances, etc.

PRIZE.

PETITIONS to allow payment of wages out of proceeds of sale of cargo.

CADWALADER, J.

The question whether wages, or an equivalent compensation for mariners, has been earned for a voyage in which a vessel has been captured, can seldom arise in a prize court. If she is restored under a proprietary claim, the question cannot be decided under the prize jurisdiction, though the wages may be recoverable in an independent proceeding in admiralty. If she is condemned, the wages are, generally, lost, either from the hostile character of the mariners personally, or from a hostile character which the employment of the vessel has imparted to them; and also in most cases, because the intended voyage has not been performed, and the freight, on which the payment of wages depends, has not been earned. In the case of a general national war between independent governments, the hostile character of the vessel or mariners must be the same, whether the voyage has been begun before or after the commencement of the war. But this is not invariably the case in a civil war. In the present war I think that it is not the case when the capture has been made before the end of a voyage which was begun before the hostile relation had arisen. In such a case, though the vessel should be condemned, I think that wages, or an equivalent for them, should be decreed where the personal relation of the mariners has not been hostile, unless the wages have been lost by reason of the non-performance of the voyage. Where it has been substantially performed, an adherence to the apparent letter of authorities applicable to cases occurring in a national war with a foreign government, would seem not less unwise than unjust. Where the voyage has been undertaken after the commencement of hostilities, reasons of policy are the same in such a war and in a civil war;

but not where the voyage has been begun previously. There may, in certain cases, be an allowance of an equivalent for freight, where freight, by name, has not been specifically earned. So, as I think, an equivalent for wages may sometimes be allowed out of a fund which would not have existed if the voyage had not, so far as the mariners are concerned, been substantially completed. Where the analogy to the case of an equivalent for freight can be maintained, the claim of wages out of the proceeds of sale of a condemned prize may, as I think, be awarded under the restrictions which are implied, if not expressed, in what has already been stated. But, in the case of the Meaco, and, perhaps, in one or two other cases, the question arises whether there may not be demerits affecting a prize vessel, for which her master, supercargo, charterers or owners, may be civilly responsible, and on account of which the vessel may be condemned, but which may not affect such a claim for mariners' wages as might otherwise, under the above restrictions, be allowable. The question is explained by considering the specific objection which has been urged in the case of the Meaco. This vessel and her master and owners may be responsible for the mode in which she was cleared for the outward voyage, and the return voyage may be inseparable from the outward, so far as they may be thus involved in the penal consequences. But an examination of her papers indicates that the mariners had probably no means of knowledge of the objectionable act or acts. On the contrary, the form of the shipping articles, and of some other papers, indicates that the outward voyage, except as to certain arrangements of an unprecedented character made at public offices on shore, had the resemblance of an ordinary one for a port of departure in a revenue collection district of the United States before the commencement of the present troubles. The affidavit of the mariners of their ignorance of the objectionable acts, ought, therefore, to be received, and its truth assumed. This case, therefore, does not, in principle, differ from that of a claim for wages by mariners shipped, before the commencement of the pres-

ent civil war, in a voyage not known by them to have been undertaken with any violation, actual or intended, of the laws of the United States, or with any hostile relation or incident. In such a case, where the voyage has been so far performed that the vessel has arrived in waters which are within the territorial maritime jurisdiction of the United States, or has reached any port so near to them that she might, in time of peace, be lawfully boarded by a vessel in the revenue collection service of their government, I think that wages, or a sum of equal amount as an equivalent for them, should be awarded out of the proceeds.

I am not aware that I am sustained in the foregoing views by any judicial precedent precisely in point; and I should think the case a very proper one for an appeal if the law officers of the United States should wish the question reconsidered. But, from the course of the successive arguments, I am induced to believe that my decision is rather in accordance with, than in opposition to their opinions.

The clerk will, therefore, according to the rules deducible from the above opinion, inquire and report from time to time the cases in which wages are, and those in which they are not allowable, to the respective petitioners, and the respective amounts to be awarded in the former cases. This order will not be considered as applicable to future claims for wages without an express direction from the Court.

DECREE.

And now, January 24, 1862, upon the claim by J. S. Phipps & Co. for the reimbursement of their advances to the amount of certain bills of exchange on Liverpool for together £5,758 16*s.* 9*d.* British sterling money out of the proceeds of the cargo of the said vessel now remaining in the registry of said court, the cause having been heard upon the said claim and preparatory proofs and papers on board of the vessel and upon further affidavits and documentary proofs received by consent and allowed by the Court; and it appearing that the legal title of the said cargo was and is in

the name of the said claimants for their security as drawers of the said bills which have been since duly paid at maturity, and that the same were for an advance of their credit by which the said cargo was in part purchased and paid for at Rio de Janeiro, and that the claimants are British subjects, who have not been resident in the United States otherwise than for commercial purposes, and that the only one of the claimants who was a resident of Louisiana had left that State and ceased to reside in it before the purchase or shipment of the said cargo, the foregoing facts being stated and admitted by the proctors and advocates as well of the United States as of the claimants, and found by the Court upon the proofs and admissions to be true. It is considered adjudged and decreed that the said claimants are entitled to and should receive reimbursement of their said advances out of the proceeds of the said cargo. And it appearing that the amount thereof with interest from the respective maturities of the said bills of exchange at the rate of 5 per cent. per annum is £5,874 16*s.* 3½*d.* sterling money aforesaid worth this day at the current rate of exchange between this port and Liverpool $29,296.26. It is decreed, ordered and adjudged that the said claimants do receive the said sum of $29,296.26, to be paid to them out of the said moneys in the registry of the court.

DISTRICT COURT. JANUARY 10, 1862.

ADMIRALTY.

THE JAMES LAMON.

1. An advance of money to a crew in lieu of wages entitles the lender to substitution against the vessel, but not to reimbursement, unless the mariners perform their duty and the vessel earns her freight.
2. A claim for expenses in bringing in the crew may stand on a different footing.

LIBEL for expenses incurred and for wages by way of advance and substitution.

CADWALADER, J.

The claim for a reimbursement of the alleged advance of wages appears to stand upon a different footing from the claim for expenses in bringing the crew from New York.

There is no specific or particular maritime necessity suggested in the libel except that mariners could not be hired in Philadelphia.

The Court will judicially take notice of the liability of this port at the present season to be closed by ice in the river, which liability therefore will be considered as if it had been averred.

As to the advance to the crew I incline to think it at best a loan of money entitling the lender to be substituted as against the vessel, for the mariners who have received it, and entitling him to reimbursement, as against her, only if they should perform their duty and the vessel should earn her freight for the voyage. If, as has been stated, they have already left the vessel, I think her exempted from liability for the demand. But counsel, who have had full time for consideration, and who may have investigated the matter more profoundly, appear to think differently; they press the claim with great earnestness.

If I could see any reasonable doubt upon the question, I, therefore, ought not to reject the claim absolutely by refusing, in this preliminary stage of the case to allow the libel; nevertheless, I would have great difficulty in allowing it, if it contained no other claim.

But the claim for expenses in bringing on the crew, stands, perhaps, on a different footing. If the vessel was without funds in the hands of the consignee or husband in this port, this charge would perhaps be a lien upon her. At all events I would not, in the present stage of the case, disallow the claim. The libel does not sufficiently aver that there were no funds to the credit of the vessel at this place, or otherwise at the command of the master. But, if they are at his command, there can be no difficulty in giving security; and as

the libel might be amended, I will not, on account of the omission, refuse to allow the process to issue, as the vessel may otherwise leave the port.

I allow the libel with great hesitation and reluctance, and with a statement that if it should ultimately be dismissed the libellant will probably be condemned in costs.

DISTRICT COURT. FEBRUARY 1, 1862.

ADMIRALTY.

THE E. WATERMAN.*

Speedy condemnation and sale of vessel and perishable cargo, her hostile character being evident and no claimant having intervened.

PRIZE.

CADWALADER, J.

The Assistant Attorney of the United States brings this case to the consideration of the Court as well upon the report of the commissioners showing that the vessel and her cargo is perishable from existing and continuing deterioration and accrued and accruing charges, as also upon the preparatory proofs showing evidently such an ownership in enemies of the United States in the present civil war as renders both vessel and cargo liable to condemnation. Whereupon the Court said: This case is within the rule which makes a condemnation proper on account of the evident character of the ownership without the delay of a year which

*Reporter's note. This case and a few others of the same kind which follow in their chronological order, although not, in form, opinions, have been thought not to be without value in a collection containing admiralty cases. In each instance mention is made of the reason, the *droit*, upon which the condemnation is made. They appear to rise, therefore, above the rank of mere formulas. If further excuse for their appearing here should be needed, it may be found in the general interest, upon a retrospective view of the subject. In cases where an opinion has been delivered they have sometimes been attached, as in the General Parkhill.

as there is no claim might otherwise be proper. The vessel and cargo are condemned.

DECREE.

Whereupon it is ordered, adjudged and decreed that the said schooner E. Waterman, her tackle, apparel and furniture, and the cargo laden on board thereof, be condemned as forfeited for the causes in the said libel set forth.

And on like motion, it is further ordered, that the said schooner, her tackle, apparel and furniture, together with the cargo laden on board, be sold according to the course and practice of the court, and that the marshal pay the proceeds thereof into the registry of the court to abide its further order and direction.

DISTRICT COURT. FEBRUARY 8, 1862.

ADMIRALTY.

THE HERALD AND CARGO.

1. The falsification of the destination of a vessel in her clearance at the port of departure should be ruled by the law of war, and is cause for her condemnation: so also, when the master in the preparatory examination made false statements for the purpose of deception as to ownership.

2. Where there is actual knowledge of an intended blockade during civil war a vessel is confiscable as for its violation where its port of departure is within the domestic jurisdiction. *Quære.* When the port of departure is within a foreign jurisdiction.

3. Indulgence in matters of practice in prize cases. Rights of foreign owners. Allowance of a year to prosecute their claims.

PRIZE.

CADWALADER, J.

The case of this vessel and that of her cargo are somewhat complicated with each other. As to the vessel—of which fifty-nine sixty-fourths are of alleged British ownership—the principal questions are:

1. Should the case be ruled by the law of war?

2. Was Beaufort harbor effectively blockaded?

3. Was there a breach of blockade?

4. Did the notification of the intended blockade of the ports of North Carolina render a vessel sailing afterwards, as this vessel did, for a port of that State *from a port of the United States*, liable to capture and condemnation, independently of any question of actual blockade of the port of destination?

5. Independently of any question of blockade, ought she to be condemned either for the sole reason that her clearance at Boston, when she was bound for Beaufort, was falsified so as to represent a *fictitious destination* for a friendly foreign port, or on account of this and other facts considered in combination with one another, and also in connection with negative circumstances of the case?

I think that the law of maritime war should rule the case.

Beaufort harbor was not blockaded when this vessel entered it, on the 10th of June, 1861. Whether it was effectively blockaded on the 14th of July, 1861, when she left it, is an unimportant inquiry; because, if there was then a blockade, there was, according to the rules prescribed in the President's previous proclamations, afterwards confirmed by Congress, no breach of blockade.

So far as the vessel is concerned, the voyage was, under the charter party, from Boston by way of Beaufort, to Liverpool; so that the primary destination to Beaufort, not less than the ulterior destination to Liverpool, must be considered. There had been a complete notification of the intended blockade; and the parties had actual knowledge of it before she left Boston. Whether, under the fourth question, the rule of decision should be the same as if the port of departure had been within a foreign jurisdiction, involves a point of great importance, which it is not necessary to decide, because the destination was falsified.

The master's conduct is, in some respects, inexplicable, if the whole truth as to interests in the profits of the voyage has, at this time, even after the latitude of proof which

has been allowed, been fairly disclosed. But if these obscurities are disregarded, the case of the vessel may be decided on either of two simple grounds, upon either of which further proof should, from the first, have been disallowed. She should be condemned, both because her destination was falsified at the port of departure, and because the master, in the preparatory examination, made false statements for the purpose of deception as to the ownership of the cargo.

The indulgence which, in matters of practice, has, in the earlier stages of the present hostilities, been extended in all cases of maritime capture, has, in this case perhaps, been extended rather too far in disregarding the defects in the test oath of the alleged owners of this vessel. The entry of the decree condemning her will be postponed for a few days, if they desire to file a suppletory test oath to go up in case of an appeal.

As to the cargo, the transactions in which Messrs. Williams and Parmelee were concerned require more satisfactory explanations than have been offered or sustained. The claim of Mr. Williams for the tar and resin and a portion of the spirits of turpentine cannot be allowed. But, in rejecting it, I ought not, at once, to condemn the subjects of it. The bills of lading for this part of the cargo describe the shipper as agent of the Liverpool consignees. This indicates an ownership in parties who, according to the rule of proceeding, are allowed a year to prosecute their claim. Their ownership was moreover affirmed by the master in the preparatory examination. However this may have been contradicted by his own subsequent affidavit, and by the further proof which has been adduced on behalf of Mr. Williams, the contradiction does not affect these absent parties, or shorten the time which is allowed to parties not incapable of claiming.

The shipments of tobacco are, according to the respective bills of lading, *for the account* of other parties in England, to whom the like delay should be extended. The particular distinctions in the facts are attended with no such difference

as excludes the application of the rule of practice. The claim interposed by the captain on behalf of other parties who are probably the true owners of the tobacco is rejected. They are parties incapable of any standing in this court as claimants. But its rejection, as in the other case, does not affect parties who are, as yet, unrepresented, however improbable it may seem that they will ever appear as claimants.

The several shipments of spirits of turpentine, which are not included in the claim of Mr. Williams, have been claimed by the master, on behalf of the respective owners. They are parties who can have no standing in court as claimants. These claims are rejected and the subjects of them condemned. But, as the vessel is of alleged foreign ownership and the cargo has not been unladen, the decree of condemnation will not be entered as to any part of it, until the formal condemnation of the vessel.

On all the questions of the case I have prepared a fuller opinion, which may, perhaps, be filed hereafter.

SENTENCE.

I, JOHN CADWALADER, Judge of the District Court of the United States in and for the Eastern District of Pennsylvania, duly authorized under the Constitution and laws of the United States to hear and determine in the said district all causes and complaints as to ships or vessels and goods, etc., seized and taken as prize, having heard and considered the merits and circumstances of a certain cause or proceeding respecting the capture or seizure of a certain brig called the Herald, whereof William Folker was master, her tackle, apparel and furniture, and also against the goods, wares and merchandise laden on board the same captured as prize by the steamer St. Lawrence of the Navy of the United States on the high seas on the 16th day of July, 1861, and brought into the port of Philadelphia in the said district, which cause or proceeding was lately and still is depending before me; And the said cause having been heard upon the libel, and several claims, and upon the preparatory and further proofs,

and having been agreed to by the Attorney of the United States, and by the respective advocates and proctors for the several claimants, and it appearing that at and before the time of the said capture civil war existed between the United States and certain enemies of the United States confederated for hostile purposes against them, and that the said vessel and the following portions of her cargo, that is to say 49 casks of spirits of turpentine marked "C," 101 casks of spirits of turpentine marked C, 200 casks of spirits of turpentine marked P, 7 casks of spirits of turpentine marked M, 10 casks of spirits of turpentine marked J, 3 casks of spirits of turpentine marked "A," 7 casks of spirits of turpentine marked E, K, H, 27 casks of spirits of turpentine marked J. M. W., and 38 casks of spirits of turpentine marked P, 50 casks of spirits of turpentine marked "T," 27 casks of spirits of turpentine marked "R," 20 casks of spirits of turpentine marked D, and 20 casks of spirits of turpentine marked "J" T, 86 casks of spirits of turpentine marked H, and 18 casks of spirits of turpentine marked H; in all 655 barrels or casks of spirits of turpentine were then the property of persons respectively within the legal description of enemies of the United States in the said civil war, and as such or otherwise confiscable; I, the said Judge, on the 18th day of March, in the year 1862, rejected the claims of the several parties respectively praying restitution of the said vessel, and of the aforesaid 655 casks of spirits of turpentine, and pronounced the said brig and 655 barrels of spirits of turpentine to have belonged at the time of the capture and seizure aforesaid to enemies of the United States in the said civil war, and to be as such or otherwise subject and liable to confiscation and condemned the same as good and lawful prize, and on application of the Attorney of the United States ordered that the said brig, her tackle, apparel and furniture, and the said 655 barrels of spirits of turpentine, be publicly sold by the marshal according to the course and practice of the court, and that the proceeds of sale be brought into the registry of the court to abide its order and direction, and as to

the residue of said cargo consisting of other spirits of turpentine, hereinafter mentioned, and resin, tar and tobacco, the several claims heretofore filed, were on the same day, upon consideration, rejected. But, forasmuch as the ownership of the said tobacco, tar and resin, and last mentioned spirits of turpentine, did not as yet certainly appear, the adjudication of the question of prize or no prize, was for the present postponed as to the same. Forasmuch however, as the said remaining spirits of turpentine as to which adjudication is postponed as aforesaid, the same being in casks of the marks and numbers following, that is to say, P 40 barrels, "B" 50 barrels, "W" 29 barrels, and "R" 15 barrels, "D" 50 barrels, "S" 60 barrels, "J" 38 barrels, "L" 20 barrels, and N 6 half barrels (according to the bills of lading), cannot remain longer on board of the said vessel, and from evaporation, which will increase as the hotter season approaches, will undergo loss and deterioration if it should remain longer unsold, therefore it was by the said judge at the same time ordered that the said remaining spirits of turpentine be sold as perishable, and that the marshal publicly sell the same according to the course and practice of the court and bring the proceeds into the registry of the court to abide its order and direction.

DISTRICT COURT. MARCH 28, 1862.

ADMIRALTY.

KENDALL *v.* JOHN MASON & CO.

(THE CAROLINE A. WHITE.)

Libel in personam on a charter party. Plea to the jurisdiction overruled.

LIBEL on contract of affreightment.

J. Hill Martin, for libellant.
Benjamin Gerhard, for respondent.

CADWALADER, J.

THIS is a plea to the jurisdiction of the court on an action in personam on a charter party of affreightment.

The Supreme Court of the United States has lately decided the question in favor of the jurisdiction of admiralty over actions in *personam,* in contracts of affreightment, in the case of Morewood *v.* Enequist, 23 Howard, 493. I overrule the plea.

DISTRICT COURT. MAY 31, 1862.

ADMIRALTY.

THE CAROLINE A. WHITE.

1. Under a contract of affreightment, containing no provision that the payment of demurrage shall depend upon the earning of freight, demurrage for extra detention at an intermediate port of an entire voyage becomes absolutely due at such port, and is recoverable though the vessel is lost in the return voyage.

2. The legal application of a word should always be uniform unless a necessary reason for modifying its application can be shown.

3. Advances on account of freight are recoverable when no freight is earned. It is otherwise as to payments.

LIBEL FOR DEMURRAGE.

CADWALADER, J.

This is a suit for demurrage, under a charter party for a voyage from Philadelphia to Cuba, and back to Philadelphia, New York or Boston. As to freight, the stipulations of the charter party were, for the purposes of the case, the same, in effect, as if a single freight had been payable for the entire voyage. The vessel was to be dispatched as soon as possible, and in no event to be detained beyond fifteen days. For loading and discharging in Cuba, thirty lay days were allowed. The charter party contained the words "demurrage, if any be incurred, $25 per day." The vessel having been detained in Cuba more than thirty lay days, the libellants demand, for this extra detention, demurrage at the stipulated

rate. On the return voyage the vessel and her cargo were totally lost at sea. Therefore no freight was earned. The libellants insist that the demurrage is nevertheless due. Their demand for it is contested on the ground that the demurrage and freight, together composed an entire compensation for the use of the vessel for the voyage, and that, as the voyage has not been performed, no part of this compensation has been earned. This objection is not sustainable, if it rests on a simple assumption that the demurrage was only a compensation to the owners of the vessel for their loss of opportunity to earn another freight. In support of the objection, a judicial dictum that "demurrage is only an extended freight," has been cited; see 4 Taunton, 52, 55. But this definition of demurrage is too narrow. Demurrage includes also compensation for the hazard of all such injuries and losses as may be caused by departure in point of time, from the regular course of the intended voyage. Thus the compensation is not single, but twofold. The dictum abovementioned may have been occasionally repeated; but judgments have also been pronounced in contested cases upon the ground that *demurrage* is not included in the most extended meaning of the simple word *freight.*" See 4 Taunton, 1; 1 Barnw. & Adolph. 118, 122; 4 El. & Bl. 945; 5 El. & Bl. 589.

The damages for extra detention, which are payable under the name of demurrage, are usually, as in the present case, liquidated at a certain daily rate or sum. Were they not thus liquidated, their legal measure would often be questionable. Whether the extra delay had been the proximate cause, or too remote a cause, of unforeseen losses from political occurrences, from fluctuations of markets, or from periodical changes of climate, or of currents of wind or water, might become questions of almost constant recurrence. One of these questionable effects might sometimes be the loss of the vessel herself, and incidentally that of the freight for the voyage. When the rate of demurrage is liquidated, the character of the damage and of such hazards is nevertheless

to be regarded. Their character would be disregarded if the recovery of the sum substituted for them, were dependent upon the subsequent performance of the voyage.

At a port of primary departure, a liability for demurrage may be incurred before any commencement of navigation. In another case of not unfrequent occurrence, the contract of affreightment requires the intended voyage to commence at a port where the vessel is not, and stipulates that she shall proceed thither for the purpose of performing the voyage. Under such a contract, any demurrage at this port of primary destination resembles demurrage at a port of primary departure. In either case the period of retardment is not a part of the time of navigation. (See Pothier, Charte-Partie, art. 85.) In each case the demurrage becomes absolutely due, independently of any question whether freight is afterwards earned. At a port of *ultimate* destination, a vessel detained with her cargo on board more than the stipulated number of lay days, or, in the absence of a stipulation, delayed beyond a reasonable time, becomes a mere substitute for a warehouse on shore. In such a case, freight is not earned until the demurrage begins to accrue. This was decided by the Supreme Court of Pennsylvania in a case in which the vessel and cargo were wholly lost during the lay days. But Chief Justice Tilghman gave no opinion what the law would have been if she had been detained by the hirer beyond the lay days, and the loss had happened while demurrage was accruing: 4 Bin. 299, 308. The proposition that, if detention by the hirer prevented the discharge of the cargo, the freight would have become absolutely due so soon as the demurrage began to accrue, was consistent with the decision, and with all the reasoning in support of it. The decision and reasoning are also consistent with the proposition as to demurrage, that if she had been lost with her lading while the demurrage was accruing, it would have been recoverable to the time of such loss.

In the present case, the extra detention was at an *intermediate* port of an *entire* voyage. The demurrage in question

may, therefore, be regarded as having, in a certain sense, accrued in the *course of navigation*. In this respect, the case may be distinguishable from the others which have been mentioned. But, is the distinction attended with any difference which is material to the question for decision? The definition of demurrage does not essentially require that the extra detention shall have been exclusively in port. Formerly vessels intended for the trade monopolized by the British East India Company, were built under contracts by which the owners engaged to let them to freight to that company for several voyages, upon the terms of their printed charter parties for vessels employed in their service. Thus an exclusive employment of the vessels in it for many years, was provided for before they were built. Lord Mansfield said of the company's printed charter party, that it was "an old instrument, informal, and, by the introduction of different clauses at different times, inaccurate, and sometimes contradictory;" adding that, "like all mercantile contracts, it ought to have a liberal interpretation." (1 Dougl. 277. See 1 Taunton, 463; 3 Dougl. 419; 4 Dougl. 28; and the forms in the English editions of Montefiore's Precedents, from which those in 4 Chitty's Commercial Law, 269 to 317 are taken.) In this instrument, the compensation payable by the company to the ship owner was described, in part as freight, and in part as demurrage, the former being a certain sum per ton for the regular period of the voyage, and the latter a certain sum per day for further detention, with no discrimination, whether the liability for either was incurred from the use or detention of the vessel in port, or at sea. It was expressly provided, that the company should not be liable for any of the sums agreed to be paid for freight, or for demurrage, unless the vessel should return to the Thames, and safely deliver her cargo to the company. This proviso was qualified in the later charter parties by certain exceptions. Before their introduction, a vessel had been chartered by the company, with an option to load her homewards within three months after her arrival in India, or to detain her there

for a year longer at certain rates of demurrage. She arrived in India, and remained there in the company's employment for the fifteen months; after which the master notified them that unless they would allow demurrage, according to the rates of the charter party, he protested against them for all damages, loss of time, or other accidents. The company thereupon agreed in writing, that the owner of the vessel should be allowed demurrage, for so long a time as she should be detained in their service in India. She was detained accordingly, and while employed there in the company's service, was wholly lost in a storm. In a suit by her owner against the company, the questions were, whether he was entitled to recover by reason of her not having been dispatched or laden homeward, at the expiration of the fifteen months from her arrival outward; and, if not, whether he was entitled to demurrage. After several arguments the company offered, by way of compromise, to pay the demurrage *to the time of her loss*, "which was accepted; after which Lord Mansfield declared the court was very clear, that the plaintiffs were entitled to no more; but declined giving any other opinion." (1 W. Bl. 291.) The report of the case is a little obscure. The point in doubt under the second question, probably was, whether the proviso in the charter party, placing demurrage on the same footing with freight, was applicable to demurrage accruing *after* the period of extra detention, to which the stipulations of the charter party had been applicable. If this was the point on which the Court would not express an opinion, it may be inferred that if the charter party had contained no such proviso, there would not have been any difficulty in recovering demurrage to the time of the loss of the vessel. In that case, her loss, though it would have been fatal to the claim for freight, would not have been an obstacle to the claim for demurrage.

The case of an occasional charter party, like the present, when the extra detention has occurred at an intermediate port of an entire voyage, is more simple. The master usually receives the demurrage money there, and applies it to the

expenses incurred through such detention. There is no trace, I believe, of an action, or claim, by the hirer of the vessel against her owner for the restoration of such money, on account of a subsequent loss of the vessel and cargo. Such actions have, on the contrary, been maintained where advances have been made in anticipation of *freight* to be earned. (4 Barnw. & Ald. 582.) Such advances are distinguished in the cases on the subject from *freight payable in advance*. The latter is due whether the voyage is afterwards performed or not. (4 M. & S. 37.) This appears to have been understood as the rule in England concerning freight, for nearly two centuries. (2 Show. 283; 3 Barnw. & Adolph. 450, 451.) The words usually contained in the demurrage clause of a formal English charter party, seem to preclude the hirer of a vessel, who has paid the demurrage at an intermediate port from afterwards reclaiming it, if the voyage is not performed. Such demurrage is usually made payable at a certain pecuniary rate *per day, for each and every day* of the extra detention in port. That these words are expressive of the meaning which would be implied without them, and are not interpretable as creating a special contract, of a peculiar character, appears upon a comparison of these formal charter parties, with what are called in the notarial formularies, memorandums of charter. The memorandum of charter, which is intended to have the same effect as the more formal contract of affreightment, does not contain the words " for *each and every day*," but simply ascertains the *rate per day*. No difference can have been intended to arise from the omission of the former words. Therefore none should be implied. This remark is perhaps important, because, in the United States, memorandums of charter are constantly met with in both forms. They sometimes, after ascertaining the number of lay days, provide that "in case the vessel is longer detained," the hirer shall pay to the owner "demurrage at the rate of" so much "per day, day by day, for every day so detained, provided such detention shall happen by default of the" hirer, "or his agent." In other

instances, as in the present case, the succinct expression *demurrage at so much per day* is substituted.

The legal application of a word should always be uniform unless a necessary reason for modifying its application can be shown. A contrary rule would produce uncertainties from which multiplied litigations might ensue. Demurrage understood in the sense of compensation for extra delay in a port of primary departure, incurred, as has already been said, before the commencement of navigation, must be recoverable, though the vessel should be afterwards lost. We have seen that there is no necessary reason that the demurrage, at an intermediate port, should be considered as dependent upon the subsequent earning of the freight. The fair inference from the use of the word demurrage is to the contrary. A different intention, where it exists, may be declared by an express provision of the contract of affreightment, as was done in a recent instance, (1 Scott N. R. 340,) and in the charter parties of the East India Company, which have been mentioned.

The decree should therefore be for the libellants.

THE COURT said further in this case in a question arising on the assessment of damages: Advances made on account of freight are recoverable from the owners of the vessel, in case no freight is earned by the vessel afterwards, as in this case where she was lost before reaching her port of destination. But payments made on account of freight payable in advance are not so recoverable. The set off of the respondents must therefore be allowed in the assessment of damages. Interest on the balance due for the demurrage will be computed from half the number of the delay days before which the vessel sailed from Cuba.

DISTRICT COURT. MARCH 31, 1862.

ADMIRALTY.

THE CALHOUN AND CARGO.

1. Among property taken from a prize vessel and sent in for adjudication, was certain private correspondence of a political nature, thought to be of value to the government. It enclosed bills of exchange. *Held*, that the bills of exchange should remain in judicial custody, and that the whole of the correspondence, including such parts as, although unimportant, showed only personal connection with the more important, should be sent to the Secretary of the Navy for transmission to the State Department.

2. The vessel in this case was not sent in for adjudication, but detained in the service of the United States. An appraisement of it was made under the authority of the captors, and the officers of the Navy Department which was transmitted to the Court. *Held*, that no claimant having intervened and assented to the substitution of the appraisement, the court had no jurisdiction to receive the amount thereof and adjudicate thereon at the suit of the United States.

PRIZE.

CADWALADER, J.

This vessel appears to have left Havana on 20th January last and to have been captured on the 23d of that month by the United States gunboat Samuel Rutan at the mouth of the Mississippi river, where she had been run by her navigators ashore and set on fire and abandoned. That her destination was New Orleans appears from papers on board. The fires were extinguished by the naval captors. The captured vessel was not sent in for adjudication. The cargo was in part placed on board of the capturing vessel and sent in her by Captain Bailey of the Navy of the United States with letters to the Judge of the Southern District of New York, whither she was destined for adjudication. The prize master by the direction of Captain Bailey proceeded to Ship Island, with a letter to Flag Officer McKean, commanding the naval force in those waters. Captain McKean, by his order of 18th February, 1862, directed that the captured property, consisting as above of part of the cargo of the prize steamer, should be brought into this port. It was accordingly brought hither

and reported for adjudication on the 10th of March, inst. Under the usual reference to the prize commissioner, his report was returned to the court on the 26th inst. Having considered it and the documents on board of the captured vessel, my attention has been directed particularly to certain papers addressed to the Secretary of the Navy, what Captain Bailey in one of his letters to the Judge of the Southern District of New York describes as "of a political nature and interesting to the department." In this letter Captain Bailey requests the judge after he shall "have looked over them," to forward them immediately to Washington. These papers have not been seen by the prize commissioner. I have lost no time in looking over them. Among them I find some letters from a resident of California, and his wife and their child to the wife's father in Charleston, South Carolina, and with some of her husband's letters, bills of exchange for two small remittances from him to her father. Being of opinion that the bill of exchange ought to be detained in judicial custody, and that all the correspondence of these parties in California should also be detained, I have separated them from the other papers in the package, which was addressed to the Secretary of the Navy. These other papers I would have thought it my duty to transmit to the State Department if they had come without any request of the naval officer transmitting them. Some of them are of political importance, perhaps great importance. The others, though private and unimportant, have a personal connection with the important papers which makes it proper that they should all remain together. I have concluded that as more of them are, in any respect, proprietary documents of the vessel or cargo, and so far as not of a political, are strictly of a private character, they should be transmitted to the Navy Department by the head of which, information of the fact will doubtless be communicated to the State Department. I am of opinion that until final judgment shall have been rendered in the cause in this court the papers should be kept in the State or Navy Department, where they may be at hand, if they

should hereinafter be required by the Court. I am induced to make this remark by an examination of the papers in the case of The Tulip, of which the report in 3d Washington Circuit Court, 182, 183, does not contain all that I consider important upon the question on which Judge Washington gave no opinion. I have considered this opinion of the Court below in that case as well as the opinion of the Appellate Court.

The clerk will therefore transmit the papers in a canvas bag labelled "Judge of the United States District Court, New York, for the Hon. Gideon Wells, Secretary of the Navy," to the Secretary of the Navy, together with papers Nos. 21, 24, 29, 38, 63 and its enclosures, and a manuscript No. 79, according to the enumeration of the prize commissioner. These last are sent because they are similar to the papers in the bag, both in character and in personal connection, though perhaps in themselves unimportant. They certainly are of no importance whatever to any question which can arise in this court.

The clerk will transmit to the Secretary of the Navy copies of Captain Bailey's two letters of 29th January, 1862, to the Judge of the Southern District of New York, of Captain McKean's letter of 18th February, 1862, to Acting Master Rogers, and of the affidavit of the prize master Mr. Tuck, and will send to the Secretary of the Navy and the Secretary of State, each a copy of this order, from the minutes of this court.

ORDER AND OPINION.

And now, January 21, 1863, the clerk of the court reporting that of the proceeds of the sale of the said cargo there remains for distribution in the registry of the court the sum of $14,412.40, and it appearing to the Court that the said steamer Calhoun has not been brought into this court for adjudication, but has been from the time of capture detained by the Government of the United States and employed in its naval service, and the said steamer having been appraised under the authority of the captors, and val-

ued by the officers of the proper department of the said government at the sum of $29,000, which appraisement and valuation the Attorney of the United States assents to and adopts; and the Government of the United States having transmitted to the clerk of the court the amount of the said appraisement, the Court said that in its opinion, though the Congress of the United States might, under the law of nations have conferred upon the district courts jurisdiction as prize courts, in cases like the present, as to vessels not within the limits of their respective districts, yet this jurisdiction has not, by the legislation in force, been actually so vested in the said district courts, and that inasmuch as the said steamer does not appear to have been within this judicial district, the Court cannot in a proceeding simply at the suit of the United States, receive the said sum of $29,000 to be adjudicated upon as a substitute for the said steamer. The Court added that there would not have been any difficulty in taking cognizance of and adjudicating the case of the vessel, if a claimant showing himself to be the party entitled to restitution in case of her liberation, had here intervened, and expressly or impliedly assented that the said $29,000 should be considered as her substitute in court. The case, the Court said, would then in principle have been like that of the Admittance reported in 13 Howard, 498, and in 18 Howard, 111, where the jurisdiction ultimately exercised was, in truth, local. But here no conversion of the vessel in question into money which is within the jurisdiction of the court as a substitute for her, has occurred so as to bind such a party.

The Court therefore directs the said clerk to return the said sum to the proper department of the said government. But the Court is of opinion, that for the purpose of equalization, in the distribution between the Government of the United States and the naval captors, the fact that the said government has the actual and exclusive use and enjoyment of the said vessel, valued as aforesaid, may be taken into consideration, and that for this purpose of equalization the said vessel and cargo may be considered as together a single

subject of capture. Wherefore the said naval captors are entitled of right as between them and the United States, to a priority of payment to the extent of one-half of the sum of the values of the said vessel and cargo, which sum is $43,412.40, and one-half thereof is $21,706.20, exceeding by $7,293.80 the amount now in court.

The decree therefore is that the whole of the net fund in court being $14,412.40 belongs of right and is payable to the naval captors to the exclusion of the United States without prejudice to any further claim of the said captors to be hereafter asserted in this court or elsewhere, to such additional portion of the proceeds of said vessel, if she should hereafter be condemned in this or any other competent tribunal, as may of right be receivable by these parties. It is further ordered that the said sum of $14,412.40 be paid forthwith into the treasury of the United States for distribution among the naval captors according to the statutes in that behalf provided.

DISTRICT COURT. MAY 6, 1862.

ADMIRALTY.

THE MAY *v.* THE REYBOLD.

A vessel which keeps the channel has a right to infer that her movement is seen by a vessel leaving her wharf, and that such vessel would not attempt to put back, but would continue her course and cross her bow. The admiralty rule of dividing the loss does not apply to such a case.

COLLISION.

CADWALADER, J.

If there had been a proper lookout from the May she would not have left her wharf under any headway without seeing the Reybold. A vessel putting out from the shore towards the channel is bound to see that it is clear of any vessel passing upward or downward whose track there might be danger of crossing. The May, therefore, was in fault. If the Reybold was also in fault, the admiralty rule of dividing

the loss might be applicable to the case. But the navigation of the Reybold appears to have been perfectly regular and proper. Her navigator, acting upon the reasonable belief that she had been seen from the May, could not anticipate that the May would attempt to put back. He had, on the contrary, a right to assume that she would continue her course in order to cross his bow. This purpose, if she had sufficient headway, could not have been interfered with by his movement in sheering inward toward the wharf. If her headway was sufficient and had been maintained, he must have passed astern of her. If she had not sufficient headway, the movement was necessary in order to save her. The testimony shows that it would have saved her if she had maintained her course instead of attempting to put back. In this opinion and in the views which I have previously expressed, the assessors concur. Upon these points I am glad that I have had the benefit of their assistance, though I had no doubt of my own to justify me in asking it. My sole reason for asking them to sit in the case was, that they might express an opinion whether the speed of the Reybold when the May left her wharf was too great for the navigation of that part of the river in the day time. A fair speed of steamers carrying passengers must be maintained, so far as may consist with the security of other vessels properly navigated. Any contrary rule, if it could be practically enforced, would be contrary to the public interests. On the other hand the enforcement of a uniform adherence to the rules of navigation secures the observance of a salutary caution which might otherwise be dangerously relaxed. On considerations of policy, not less than of justice, this libel ought therefore to be dismissed.

Decree that the libel be dismissed with costs.

On APPEAL to the circuit court, Judge Grier concurred with the views above expressed.

DISTRICT COURT. JUNE 25, 1862.

ADMIRALTY.

THE GUIDE AND CARGO.

Breach of existing blockade. Condemnation and sentence.

PRIZE.

CADWALADER, J.

I, John Cadwalader, Judge of the District Court of the United States for the Eastern District of Pennsylvania, duly authorized under the Constitution and laws of the United States to hear and determine in the said district all causes and complaints as to ships and vessels and goods, etc., seized and taken as prize, having heard and considered the merits and circumstances of a certain schooner called the Guide, whereof Alexander Smith was master, her tackle, apparel and furniture, and the goods, wares and merchandise laden on board thereof, the same having been captured on the high seas on the 19th day of April, 1862, by the United States gunboat Huron and brought into the port of Philadelphia in the said district; And the said cause having come up upon the application of the Assistant Attorney of the United States for the condemnation of the said schooner and cargo, and it appearing to the Court that three several proclamations had been made that if any one hath aught to say why the said vessel should not be condemned as forfeited he may appear, and no claimant having appeared, and the cause having been considered upon the libel filed therein and the examination in preparatorio; and it appearing from and by the said examination that the said capture was made about ten o'clock on the night of the 19th of April last, 1862, off the blockaded port of Charleston, South Carolina, and about nine miles from the bar at Dewey's Inlet, from which port she had sailed previously to the said capture upon an alleged voyage to the port of Nassau, New Providence; And it further appearing from and by the said examination in preparatorio

that all the papers, documents and writings on board of the said vessel at the time of sailing on the said voyage were destroyed during the time the said schooner was being chased by the said capturing vessel; And it further appearing from and by the said examinations that the cargo laden on board of the said schooner was put on board at the aforesaid blockaded port of Charleston by a person or persons commercially resident in the said State of South Carolina; I, the said Judge, am of opinion that by reason of the premises and other matters apparent in the said preparatory proof, the said vessel and cargo are liable to confiscation and condemnation for breach of the existing blockade and as being within the legal designation of property of enemies of the United States in the present civil war; And the Assistant Attorney of the United States praying condemnation of the said schooner and cargo as prize of war, I do pronounce and adjudge the said schooner and cargo to have belonged at the time of the capture aforesaid to enemies of the United States in the said civil war, and to be as such or otherwise subject and liable to confiscation, and to condemn the same as good and lawful prize.

And on like motion, it is further ordered that the said vessel and cargo be sold by the marshal according to the course and practice of this court, and that he pay the proceeds of said sale into the registry of the court to abide its order and direction.

DISTRICT COURT. JULY 8, 1862.

ADMIRALTY.

THE LACRIOLLA AND CARGO.

Blockade. Fraudulent destination of vessel. Destruction of papers. Condemnation.

PRIZE.

CADWALADER, J.

I, John Cadwalader, Judge of the District Court of the United States for the Eastern District of Pennsylvania, duly

authorized under the Constitution and laws of the United States to hear and determine in the said district all causes and complaints as to ships or vessels, etc., seized and taken as prize, having heard and considered the merits and circumstances of a certain cause or proceeding respecting the capture or seizure of a certain schooner called the Lacriolla, ——— ——— master, her tackle, apparel, and furniture, captured on the high seas on the 29th of May, 1862, by the United States steamer Bienville, of the navy of the United States, and brought into the port of Philadelphia, in the said district, which cause or proceeding was lately and still is depending before me.

And the said cause having come up on the application of the Attorney of the United States for the condemnation of the said schooner and cargo; and it appearing to the court that three several proclamations had been made, that if any one hath aught to say why the said vessel and cargo should not be condemned he may appear, and no claimant having appeared, and the cause having been considered upon the libel filed therein, and the examinations in preparatorio, and the papers and documents found on board of said schooner at the time of her capture, and it appearing from and by the said examination in preparatorio that the said capture was made on the 29th day of March, twenty-five miles more or less south southeast from the blockaded port of Charleston, the said schooner being then and there becalmed and at anchor, having sailed from the port of Nassau bound for the said blockaded port of Charleston, but with a falsified and fraudulent destination for St. Johns, New Brunswick, as appears from and by the answers of the said master to the standing interrogations, who deposes that he cleared the said schooner for the said port of St. Johns, New Brunswick, but that he was to go to the said port of Charleston, and that in carrying out that intention of endeavoring to do so, the said vessel was captured, and it further appearing that a few minutes before the said capture, and while the said schooner was being chased by the said capturing vessel, certain letters and

papers relating to the said cargo were thrown overboard by the said master, the premises having been duly considered and the proofs as to the ownership of the captured vessel and cargo having been also considered; I, the said judge, was of opinion that the said vessel and her cargo for the breach of blockade, and other causes appearing in the proofs, was confiscable and liable to condemnation as prize of war; wherefore it is adjudged and decreed that the said vessel and her cargo should be and the same be condemned as property of enemies of the United States in the existing civil war or otherwise confiscable as lawful prize of war.

And on like motion, it is further ordered, that the same be sold by the marshal pursuant to the course and practice of this court, and that he pay the proceeds thereof into the registry of the court, to abide its further order and direction.

DISTRICT COURT. JULY 11, 1862.

ADMIRALTY.

THE PROVIDENCE AND CARGO.

Blockade. Ownership of vessel and cargo in the same persons.

PRIZE.

CADWALADER, J.

I, John Cadwalader, Judge of the District Court of the United States for the Eastern District of Pennsylvania, duly authorized under the Constitution and laws of the United States to hear and determine in said district all causes and complaints as to ships and vessels seized as prize, having heard and considered the merits and circumstances of a certain cause of proceeding respecting the capture or seizure of a certain schooner called the Providence, whereof Burrows Palmer was master, her tackle, apparel and furniture, captured on the high seas on 29th day of May, 1862, by the United States steamer Bienville, and brought into the port

of Philadelphia in said district, which cause or proceeding was lately and still is depending before me; and the said cause having come up on the application of the Attorney of the United States for the condemnation of the said schooner and cargo; and it appearing to the Court that three several proclamations had been made, that if any one hath aught to say why the said vessel and cargo should not be condemned he may appear, and no claimant having appeared, and the cause having been considered upon the libel filed thereon, and the examinations in preparatorio, and the papers and documents found on board of the said schooner at the time of her capture; and it appearing from and by the said proofs that the said capture was made on the 29th day of May, 1862, in north latitude 30° 25′ and in longitude 79° 34′, about twenty-five miles from the coast of South Carolina and from the blockaded port of Charleston, the said schooner bearing at the time north by west half west, and it appearing from them that the said schooner sailed from Nassau bound for the said blockaded port of Charleston but with a falsified and fraudulent destination for the port of Baltimore, as appears from and by the answers of the said master to the standing interrogatories; and the master of the said vessel in his examination deposing that all the owners of said vessel reside in Charleston, South Carolina, and that the owners of the said cargo are the same as the owners of the vessel; the premises having been duly considered, I, the said judge, was of opinion that the said vessel and her cargo for the breach of blockade and other causes appearing in the proofs was confiscable, and liable to condemnation as prize of war. Wherefore, it is on this 11th day of July, A. D. 1862, adjudged and decreed that the said vessel and her cargo should be and the same are hereby condemned as property of enemies of the United States in the existing civil war, or otherwise confiscable as lawful prize of war.

DISTRICT COURT. JULY 15, 1862.

ADMIRALTY.

THE EMILIE AND CARGO.

Captured vessel containing powder. Injury by detention. Appointment of commissioners.

PRIZE.

CADWALADER, J.

The Assistant District Attorney presents libel, and prays process, and the said libel having been allowed the Court having been given to understand that there is powder on board the captured vessel, and her cargo book indicating that such is the fact, and the marshal asking permission to unload the said powder, and store the same in a place of security, the Court appoint Thomas P. Stotesbury, James L. Taylor, and Daniel L. Miller, Jr., surveyors and appraisers, and commission them to examine the said vessel and her cargo, and report the particulars and value thereof, and the liability, if any, of the said vessel and cargo or any part or parts thereof to loss, injury or deterioration in value from detention, and what measures, if any, should be adopted for the preservation or security thereof, and to report the accruing charges and such other facts as may in their judgment be material in the premises; and leave is given to the said surveyors and appraisers to examine in the presence of one or both of the prize commissioners such invoices and other proprietary and other documents of the said vessel and her cargo as may facilitate the execution of their duty in the premises and to report from time to time as their duties may be partially executed if they see reason for so doing; and leave is given to the marshal in the presence of the said surveyors and appraisers, or of any two of them and of the prize commissioners or one of them to open the hatches for the purpose of getting at the powder, which may be found on board, and to unload the same, and remove it to a place of security, and to report specially in relation thereto

or to other portions of the cargo, so far as what may be material in respect thereof which shall not be included in the reports of the said surveyors and appraisers or prize commissioners, or so far as the said marshal may see cause to report on his own behalf.

JULY 29, 1862.

Report of prize commissioner under order of 21st inst. (as to portions of the cargo of the said steamer missing and the causes of their being missing presented):

Whereupon the Court approve of the restoration of the several trunks and their contents mentioned at the commencement of the said report.

As to the other trunk mentioned at the close of the said report, which last mentioned trunk and its contents remain as the prize commissioner states under seal, the Court as at present advised refuses to restore the same, giving leave, however, to the supercargo to make a formal claim or application for its restoration, if he see proper so to do.

DISTRICT COURT. JULY 17, 1862.

ADMIRALTY.

THE ROWENA AND CARGO.

Blockade. Condemnation.

PRIZE.

SENTENCE.

CADWALADER, J.

I, John Cadwalader, Judge of the District Court of the United States for the Eastern District of Pennsylvania, duly authorized under the Constitution and laws of the United States to hear and determine in the said district all causes and complaints as to ships or vessels, etc., seized as prize, having heard and considered the merits and circumstances of a certain cause or proceeding respecting the capture of a

certain schooner called the Rowena, whereof Edward Ward was master, captured on the 7th day of June, A. D. 1862, on the high seas by the United States gunboat Pembina, of the Navy of the United States, and brought into the port of Philadelphia in the said district, which cause or proceeding was lately and still is depending before me; and the said cause having come up on the application of the Attorney of the United States for the condemnation of the said schooner and cargo, and it appearing to the Court that three several proclamations had been made, that if any one hath aught to say why the said vessel and cargo should not be condemned he may appear and be heard, and no claimant having intervened and the case having been considered upon the libel filed therein and the examination in preparatorio and the papers and documents found on board of the said vessel at the time of her capture; and it appearing from and by the said examinations that the capture was made on the 7th day of June, 1862, in Stono Inlet, South Carolina, which was then and there under blockade about three miles inside the entrance of said inlet, the said schooner having sailed from the port of Nassau for the blockaded port of Charleston or some of the neighboring inlets, but with a falsified and fraudulent destination to St. Johns, New Brunswick, the premises and other matters appearing from the said preparatory proofs and from the said papers having been duly considered; I, the said Judge, was of opinion that the said vessel and cargo were confiscable and liable to condemnation as prize of war. Wherefore it was on this 17th day of July, 1862, adjudged and decreed that the said vessel and her cargo should be and the same are hereby condemned as property of enemies of the United States or otherwise confiscable as lawful prize.

And on like motion, it is ordered, adjudged and decreed that the said schooner Rowena, her tackle, apparel and furniture and the cargo laden on board thereof be sold by the marshal pursuant to the course and practice of this court, and that he pay the proceeds thereof into the registry of the court to abide its order and direction.

DISTRICT COURT. AUGUST 26, 1862.

ADMIRALTY.

THE LODONA.

Review of acts of Congress relating to fees and distribution in prize cases.

PRIZE.

REFERENCE TO COMMISSIONER.

REPORT of commissioner to whom was referred the claim of the clerk and marshal for compensation. No further contention appears to have been made.

CADWALADER, J.

In this case the prize commissioners stating that, for the reasons set forth in the report in the case of the Florida, this vessel is undergoing such deterioration from detention, that by reason thereof and of accruing charges she is properly to be regarded as perishable, and the Attorney of the United States stating that the government which he represents in this court is desirous of taking her immediately for public use, at any valuation at which she may be reasonably appraised, the Court said: The monition in this case is returnable on the 5th of September next, before which day the third proclamation will have been made. Should no claim of restitution have been interposed, the case may perhaps be determined on the preparatory proofs upon the return of the monition; in the meantime I cannot make an irrevocable order to sell the vessel as perishable, upon the present informal report of the commissioners. I direct a commission to be issued to John H. Young, Jacob G. Neafie and Samuel V. Merrick, to report specially upon the condition of the vessel and her liability to unavoidable deterioration, and upon every other matter which may enable me to decide whether she is in an absolute or relative sense perishable from detention in custody. Upon the report of these commissioners I will probably be able definitively to decide whether

she should be sold as perishable or should remain in custody till condemnation or acquittal. In the meantime, however, I am justified as I think by the act of Congress of the 25th of March last, in making provisionally an order of sale upon the report of the prize commissioners already before me. This order is therefore made, and a writ of sale will issue returnable on the 12th of September next. Should the vessel in the meantime be condemned the sale will at all events be made. The result will be the same, though she should not be condemned if the report of the new commissioners should not induce a rescission of the order of sale now made. Should the report of these gentlemen induce the Court ultimately to take a view of the subject different from that of the prize commissioners, the order of sale will be rescinded if the vessel should not have been condemned. Her value is such that the expense incurred in the meantime, under the writ of sale in advertising, etc., will be proportionately too insignificant for consideration.

It is further ordered that the said commissioners have leave to employ J. H. Martin, or some other competent person, as clerk to aid them in the performance of said duties.

THE REPORT of the commissioners having been filed.

THE COURT said: I have considered the questions which are presented upon the report of Mr. Flanders, prize commissioner as to the claim of the clerk and marshal, respectively, for compensation from the funds which are subject in this case to the order of the Court.

The act of Congress of 26th February, 1853, Ch. 80, allows to the marshal for sales of vessels or other property under process in admiralty, or under the order of a court of admiralty, and for receiving and paying the money, for any sum under $500 2½ per cent., and for any larger sum 1¼ per cent. upon the excess, and the necessary expenses of keeping the property, not exceeding $2.50 per day; and in case the debt or claim shall be settled by the parties *without a sale* of the property, a commission of 1 per cent. on the first $500

of the claim or decree and one-half of 1 per cent. on the excess over $500. The same act allows the clerk of the court for receiving, keeping and paying out money in pursuance of the requirements of any statute, or order of court, 1 per cent. on the amount so received, kept and paid. That this act applies to prize cases, where it is not otherwise provided by law, appears from the paragraph at foot of page 168 in the tenth volume of Little & Brown's Edition of the Laws. The act contains a provision that no district attorney, marshal or clerk, or their deputies, shall receive any other or greater compensation for any services rendered than is provided in the act. The act of 25th March, 1862, ch. 50, §§ 1 and 4, provided for the payment by the marshal of the gross proceeds of every sale under an interlocutory or final order or decree into the registry of the court, to abide its order, and the subsequent payment of the ascertained net amount into the treasury after final decree. The same law enacts that the prize commissioners, and also the district attorney shall receive a just and suitable compensation for their several and respective services in each prize case, or proceeding, to be adjusted and determined by the Court; but contains no such provision as to the marshal or clerk. The act of 17th July, 1862, ch. 204, § 12, (12 Ll. U. S. 608,) provides that, in cases of prize, whenever a final decree of condemnation shall have been made, or any interlocutory sale has been ordered, the property shall be sold by the marshal pursuant to the practice and proceedings in admiralty, and the gross proceeds of such sale shall be forthwith deposited with the assistant Treasurer of the United States at, or nearest to the place of sale, to remain in the treasury until final decree, whereupon the costs and lawful charges and expenses shall be paid, and the balance distributed according to the decree. A resolution of Congress of the same date provided that thereafter all such moneys arising from sales should be paid by the marshal into the treasury instead of the registry of the court, less the costs and disbursements sworn to by the marshal and taxed by the court; and that every clerk then

having any such moneys in hand should immediately pay the same into the treasury less such costs and disbursements; and, upon final decree the Secretary of the Treasury was authorized to pay over the same upon the order of the court; and it was provided that no more should be retained by any clerk from money received and paid over by him under that resolution as commissions or otherwise than one per centum upon the first $1,000, in each case, and one-fourth of one per centum on the excess above that sum, not, however, to exceed $250 in any case.

The act of 3d March, 1863, further to regulate proceedings in prize cases, and to amend various acts of Congress in relation thereto, enacts that upon any sale of prize property, the marshal shall forthwith deposit the gross proceeds with the Assistant Treasurer of the United States nearest to the place of sale and subject to the order of the court in the particular case; and that the court may, at any time, order the payment from such deposit of the expenses and disbursements necessarily incurred in the custody, preservation and sale of the property audited and allowed by the court; that when a decree of commendation shall be made in any cause the court may, in like manner, order the payment from such deposit of the costs, fees and charges decreed; and that, on a final decree of distribution, the residue of the deposit shall be paid into the treasury for distribution. This act authorizes the Secretary of the Navy to employ an auctioneer or auctioneers to make sales of prize goods under the direction of the marshal, at a rate of compensation not to exceed in any case 1¼ per cent. upon the gross proceeds. The act also authorizes the Secretary of the Navy or of War to take any captured vessel, any arms or munitions of war, or other material for the use of the government; and when the same shall have been taken, before being sent in for adjudication or afterwards, the department for whose use it was taken shall deposit the value in the treasury subject to the order of the court in which prize proceedings shall be taken in the case; and that when there is a final decree of

distribution in the prize court, or if no proceedings in prize shall be taken, the money shall be credited to the Navy Department to be distributed according to law.

This vessel was condemned on 12th September, 1862, that is to say after the act and resolution of 17th July, 1862, and before the act of 3d March, 1863. On 24th September, 1862, she was, on application of the District Attorney of the United States, on behalf of the Navy Department, adjudged to the United States at the appraised value of $80,000, and that amount having been paid into the registry of the court, it was ordered that the marshal execute an instrument of transfer to the United States, which was done, and the instrument acknowledged and recorded in court. On 18th March, 1863, the clerk, by order of the court, deposited this amount with the Assistant Treasurer of the United States to the order of the court in the cause.

Upon the distribution of this fund the question arises whether the marshal and clerk respectively should receive any and what commission.

It is clear that there was no sale of the vessel upon which, as such, a commission could be charged by the marshal. But, I concur with Mr. Flanders in opinion that the case of a settlement by the parties *without a sale* of the property has occurred within the fair meaning of the act of 1853; and that the marshal is, therefore, entitled to the reduced commission of one per cent. on $500 and one-half of that per centage on $79,500, this commission amounting to $402.50.

The effect of the act of 3d March, 1863, may have been to deprive the clerk of all emolument, in the way of commissions or otherwise, in cases of this kind arising after the date of the act. But I perceive nothing in the previous legislation which had the effect of depriving him of his commission of one per cent. under the act of 1853.

The purpose of the act of 17th July, 1862, and resolution of the same date was to prevent a double commission on a sale, or what was, in effect, the same thing. To effectuate this, the act relieved the clerk of the burden and responsi-

bility of the duty to receive and pay over the money upon which he was not allowed to charge a commission. But, in the case in question, this burden and responsibility was cast upon him. The case is neither within the letter, nor within the apparent spirit and purpose of the legislation of 17th July, 1862. The practical result proves this to be the case. His commission of $800 and the marshal's $402.50 amount together to $1,202.50. The marshal's commission on a sale would have been $1,018.75, to which the auctioneer's would have been added.

In this district the actual duty of safe keeping and checking, etc., had, under the previous practice, devolved upon the clerk. He still incurs the responsibility and labor of checking, etc., upon which it may be, that he will receive no compensation under the act of 3d March, 1863.

This act should not operate retrospectively upon a case not affected by the prior legislation.

As at present advised, I therefore think that he should, in this case, receive $800 and the marshal $402.50. But the case may stand over to give an opportunity to the Attorney of the United States, and counsel or agent of the naval captors to make further contestation, if they shall see proper.

DISTRICT COURT. September 1, 1862.

HABEAS CORPUS.

THE UNITED STATES, EX PARTE CHARLES INGERSOLL.

1. The discharge of a person under confinement accomplishes the purpose of a writ of habeas corpus, and the expression of opinion as to the sufficiency of the reasons for the detention would be out of place.

2. The official character of the person to whom the writ was directed might possibly make an exception, if the case had been argued.

RETURN to Writ of Habeas Corpus.

THE MARSHAL returns writ of habeas corpus, I, William Millward, Marshal of the United States for the Eastern

District of Pennsylvania, do certify that before the coming of this writ of *habeas corpus*, the within named Charles Ingersoll was delivered into my custody by William H. Kern, the Provost Marshal of this city, for the United States, accompanied by an affidavit upon which the said Charles Ingersoll was arrested by the Provost Marshal, which affidavit, together with a report of the arrest, was sent by me to Major L. C. Turner, Judge Advocate, Washington, D. C., in pursuance of a general order from the War Department, and that on Saturday, the 30th of August, last past, a telegraphic despatch was received by me from the said L. C. Turner, Judge Advocate, directing me, by order of the Secretary of War, to release the said Charles Ingersoll from custody of which he has been notified, and released in pursuance of said order and is not restrained from his liberty.

BY THE COURT:

The purpose of the proceedings under a writ of *habeas corpus* is accomplished, when the party, whose personal liberty has been restrained, is effectually discharged from confinement. Its purpose is not to obtain redress, or indemnity for the imprisonment, if it has been unlawful. The present return, therefore, appears to me to terminate the proceedings. As the petitioner is not now under any restraint of his personal freedom, an expression by me of an opinion as to the sufficiency of the reasons alleged for the original imprisonment and detention would, I think, be out of place. The official character of the persons to whom the writ is directed, might, possibly, have made this case an exception from the general truth of the last remark if the case had been argued before me, so as to warrant the expression of an opinion.

But there has not been any such argument, and I therefore, inasmuch as the marshal returns that the petitioner is not under restraint, inform him that he is at liberty to depart, and go whither he may please.

DISTRICT COURT. September 8, 1862.

ADMIRALTY.

THE INTENDED AND CARGO.

A falsification of actual destination which was to a blockaded port, is ground for confiscation.

PRIZE.

THE COURT made the following decree:

And now, September 8, this case having been formerly heard upon the libel and claim, the preparatory proofs and the documents found on board and with the said vessel at the time of her capture, and having stood over for further proof as fully appears in the court's order of 20 June last, came on for further hearing, when the depositions of William Ellery and —— Avery, taken on behalf of the United States in relation to the conduct of the said vessel immediately before and at the time of her capture, were read, and the case having been fully considered, and it appearing that the capture was made off the blockaded coast of North Carolina as the said captured vessel was standing in for and towards an inlet upon said coast, she having sailed from the port of Nassau, New Providence, for said inlet or some other place or point on said blockaded coast of North Carolina, with a falsified and fraudulent destination to the Port of Baltimore, the court were of opinion that by reason of her said actual destination and falsification of the same she was confiscable and liable to condemnation as lawful prize of war and within the legal description of property of enemies of the United States, and upon the application of the Attorney of the United States, praying condemnation of the said vessel and cargo as prize the court did on this 8th day of September in the year 1862, pronounce the said vessel and cargo to have belonged at the time of the capture aforesaid to enemies of the United States and to be as such or otherwise subject and liable to confiscation, and did condemn the same as good and lawful prize.

DISTRICT COURT. October 17, 1862.

ADMIRALTY.

THE FANNY LEE AND CARGO.

Capture on the high seas. Hearing upon claims. Confiscation.

PRIZE.

CADWALADER, J.

I, JOHN CADWALADER, Judge of the District Court of the United States, in and for the Eastern District of Pennsylvania, duly authorized under the Constitution and laws of the United States to hear and determine in said district all causes and complaints as to ships and vessels, etc., seized as prize of war, having heard and considered the merits and circumstances of a certain cause or proceeding respecting the capture of a certain schooner called the Fanny Lee, whereof Fritzinger was master, captured on the high seas by the United States vessel of war the St. Lawrence of the navy of the United States and brought into the Port of Philadelphia in said district, which cause or proceeding was lately and still is depending before me. And the said cause having been heard upon the libel, the respective claims of Nehemiah R. Clements and of the said Fritzinger for the said schooner and cargo, the examination in preparatorio, the papers found on board and with the said vessel, and certain depositions taken on behalf of claimant of the said cargo, and having been argued by the Attorney and Assistant Attorney of the United States and the respective advocates for the claimants, and it appearing to the court from and by the said proofs, papers and depositions that the said vessel and her cargo were the property of enemies of the United States, and as such or otherwise confiscable, I, the said judge, on the 15th day of October, A. D. 1862, did pronounce the said schooner and her cargo to have belonged at the time of the capture and seizure aforesaid to the enemies of the United States, and to be as such or otherwise subject and

liable to confiscation and condemnation, and condemned the same as good and lawful prize.

DISTRICT COURT. March 27, 1863.

HABEAS CORPUS.

CORNELIUS McCALL'S CASE.

1. When persons who are to render military service have been ascertained by draft or otherwise, and have been lawfully commanded to attend a rendezvous, those who disobey may be subjected by military force to military discipline and organization, where legislation has not substituted a different rule.

2. When a militiaman of a State, duly called under the act of Congress of 17th July, 1862, ch. 201, into the military service of the United States, has disobeyed an order to attend at a rendezvous, his subjection to military discipline and organization is compellable by military force.

3. Militiamen of the States who are liable to be called into the service of the United States through enrollment and draft, cannot be lawfully drafted unless their names have previously been accurately enrolled. A misnomer in the enrollment prevents the person misnamed from being liable to the draft.

4. Legislation of the United States, both of 1792 and 1862, requiring the enrollment in the militia of the States, of all citizens between the ages of eighteen and forty-five years, but, intervening, legislation of Pennsylvania requiring the enrollment in her militia of only persons between the ages of twenty-one and forty-five years, *Quære*, whether, in Pennsylvania, a draft of militiamen, under a call from the government of the United States, made from an enrollment which omits the names of persons between the ages of eighteen and twenty-one years, is binding upon the persons drafted.

PETITION for Habeas Corpus.

CADWALADER, J.

The petitioner was arrested at his residence in Montgomery County, Pennsylvania, by military officers of the United States, as a deserter from the military service into which he had, as they allege, been drafted under the act of the 17th July, 1862. The allegation is that he disobeyed the order to attend at the county-seat within five days of the time of drafting. The arrest was made under the supposed authority of the act of Congress of 3d March, 1863, for en-

rolling and calling out the national forces, and for other purposes. The 13th section of this law enacts, that a person drafted under it, failing to report at the place of rendezvous without furnishing a substitute, or paying the authorized equivalent, shall be deemed a *deserter*, and shall be arrested and sent to the nearest military post for trial by court-martial, unless, upon proper showing that he is not liable to do military duty, the board of enrollment shall relieve him from the draft. The 7th section confers an authority to arrest all *deserters*, whether regulars, volunteers, militiamen or persons called into the service under this or *any other* act of Congress, wherever they may be found, and to send them to the nearest military commander or military post. This section, which is relied on as authorizing the arrest, cannot apply retrospectively to any person drafted under the former act, who was not *already*, in law, a *deserter*. The constitutional prohibition to pass an *ex post facto* law, would prevent this. The section must, therefore, be understood as intended to apply only to such persons drafted under the former act as had been mustered into the service. But though the officers were mistaken as to the authority under which they supposed that the arrest might be made, the party arrested should not be discharged, if, independently of the latter act of Congress, he is subject, under the act of 17th July, 1862, to military detention, as a person compellable to render military service.

When the inhabitants of a country who are liable to be called into military service have been enrolled, and such of them as are to render the service have been ascertained by draft, the persons thus drafted have been lawfully required to attend at an appointed time and place of muster, those who disobey are amenable to military discipline and military organization, unless the subject has been otherwise legislatively regulated. Where the government, whose authority they have set at naught, may by military force compel their subjection to such discipline and organization—the system is a *conscription*. But where, though their offense is

cognizable by a military tribunal, their disobedience is punishable only by a certain pecuniary or other penalty, and they cannot be further subjected to military discipline or detention, the system is not a *conscription*, as the word is now ordinarily understood. Judge Washington said that under a system of the latter kind, a fine to be paid by the delinquent is deemed an equivalent for his service, and an atonement for his disobedience: 5 Wheaton, 20, 21. Under a system of the former kind, the conscript who fails to attend the muster is not a *deserter*, unless this word has been made specially applicable to his case by legislation. But his disobedience is a military offense. It is not the less of this character because it may not be within the ordinary meaning of *desertion*, or may be of a less aggravated grade. He is liable not only to military arrest and military compulsion or punishment but also to ulterior military detention.

The Constitution of the United States authorizes Congress to raise armies, and also to call forth and organize the militia of the several States. Under this twofold power, both regular national armies, and occasional militia forces from the several States, may be raised, either by conscription or in other modes. (5 Wheaton, 17.) The power to raise them by conscription may, at a crisis of extreme exigency, be indispensable to national security.

Until after the end of the first year of the present war, no such crisis had ever, in the opinion of Congress, occurred in the United States. Regular armies had been raised altogether by voluntary enlistment. Successive acts of Congress had authorized occasional calls by the President upon the several States for the services of militiamen for limited periods. Under the acts of 1792 and 1795, the militia of the States when thus called forth, might have been retained in service until the expiration of thirty days after the next session of Congress; but no militiaman was compellable to serve more than three months in any one year. These two limitations of time were repealed by the act of 29th July, 1861. The only limitation substituted by it was that the service should

not continue beyond sixty days after the commencement of the next session of Congress, unless a further continuance should be expressly provided for by law. Judges of the Supreme Court who differed on some other points, all concurred in the opinion that Congress, in framing such acts, might lawfully have designated both the officer and private who should serve, and have called him into service with a complete military subjection to the national government, commencing at the time of such designation, or at that of a draft, or at that of an order to attend a muster, as distinguished from that of reaching the place of muster. (5 Wheaton, 36, 37, 16, 17, 18, 20, 56, 64.) But, as the laws of 1792 and 1795, and July, 1861, were framed, this military subjection of a drafted militiaman did not begin until he was mustered into the national military service. His previous military relation only required that if he disobeyed the order to attend the muster he should submit to the imposition of a limited pecuniary penalty, with a limited imprisonment for non-payment, and a liability in the case of an officer to be cashiered and temporarily incapacitated from holding a commission. These penalties were to be adjudged by a court martial. That this was the mode of trial shows that the offense of disobedience to attend the muster was of military cognizance. But no department or officer of the government of the United States could, under these laws, compel a drafted militiaman to be mustered into the service or to attend a place of muster, or to undergo punishment beyond the prescribed penalties, or submit to ulterior military detention. Another act of Congress of the year 1792, which continued in force, had prescribed the enrollment of every free, able-bodied, white male citizen between the ages of eighteen and forty-five years, in the militia of the several States. But the drafting, and procuring the attendance of drafted men to be mustered in, had, except in the imposition of these limited penalties, been left by Congress to the legislation of the States.

The act of Congress of 17th July, 1862, indicates, how-

ever, that the former system of legislation was thought inadequate for the exigencies of a second year of the present war. Several hundred thousand volunteer militiamen had, in the interval, been received into the national service. But a prompt reinforcement of at least three hundred thousand men for a service of nine months was thought necessary.

The defects of the former system for such a crisis were that the enrollments of the militia in some States had been omitted, and in others had not been regularly or uniformly made, so as to prepare proper lists for drafting; and, that there was no law of the United States to compel by military force the mustering of those who might be drafted. The laws of the States authorized no such compulsion. They had been framed by men averse to the system of conscription, who never anticipated such a necessity for its adoption as had unfortunately occurred. The act of July, 1862, was intended to meet the exigencies of this crisis, and also to provide for cases of like exigency in time to come. The first section enacts that whenever the President shall call the militia of the States into the service of the United States, he may specify the period, not exceeding nine months, for which their service will be required; "and the militia so called *shall* be *mustered in*, and continue to serve for and during the term so specified, unless sooner discharged by command of the President. If, by reason of defects in existing laws, or *in the execution of them*, in the several States, or any of them, it shall be found necessary to provide for enrolling the militia, *and otherwise putting this act into execution*, the President is authorized, in such cases, to make all necessary rules and regulations." The provision of the act of 8th of May, 1792, for the enrollment in the militia of citizens between the ages of eighteen and forty-five was re-enacted in a modified form. On 4th August, 1862, the President, through the War Department, issued a call for an immediate draft of 300,000 men from the militia of the several States for a service of nine months unless sooner discharged; and ordered the Secretary of War to assign the quotas to the

respective States, and establish regulations for the draft. The Secretary of War, accordingly, designated the quotas of the States in communications of 9th August, 1862, to the respective governors; and by general orders of 9th and 14th August, 1862, established administrative regulations for the enrollment and draft, and for an apportionment of the quotas among counties, etc., so that allowances should be made locally for volunteers previously furnished. Under these orders the respective governors were to cause the necessary enrollments to be made in the several counties of all able-bodied male citizens between the ages of eighteen and forty-five years; and were to appoint a commissioner to superintend the draft in every county of States in which no provision had been made by law for carrying it into effect, or existing provisions were, in any manner, defective. Regulations for making the enrollment and draft in such cases were prescribed in detail. The respective governors were requested to designate, in the meantime, places of rendezvous in the several States. Written or printed notices were to be served on the persons drafted, who were ordered to assemble within five days at the respective county seats, whence transportation to the place of rendezvous would be furnished. The Governor of Pennsylvania carried these directions and requests into execution through commissioners to superintend the draft for their respective counties, etc. In Montgomery county the notices to those drafted, served in October, 1862, informed them that they had been drafted into the military service of the United States, and required them to attend at the rendezvous at the Court House in Norristown within five days after service of the notice.

The act of 17th July, 1862, does not contain the word *conscription;* nor is this word in the subsequent act of 3d March, 1863. The latter act has established, nevertheless, a system of raising and recruiting for the present war, independently of the States, a regular national army by conscription. The exercise of the powers of compulsory drafting conferred by this law may, possibly, prevent future calls,

during the war, upon the States, for bodies of their militia to be obtained for the national service by such drafting. Though this may be not only possible, but probable, the act has not repealed that of 17th July, 1862, or *necessarily* superseded its execution, or substituted—as to the militia of the States—any other system. For the purposes of the present case, the effect of the act of July, 1862, therefore, is precisely the same as if no subsequent law had been passed.

The effect of the act of July, 1862, has been, I think, to establish a system for obtaining, from time to time, upon the call of the President, as occasion may require, bodies of militia from the several States by conscription; that is to say, by draft, with a right of compelling the attendance of the men drafted.

In stating the reasons of this opinion, I will, in order to follow the course of the argument, consider first the intended effect of the act, and afterwards the question whether the legislative intention can take effect.

It has been argued that the sole purpose of the act was to obtain militiamen for nine months, instead of the former term of service For this purpose, however, if no further change of system was intended, a few simple words would have sufficed. These words are contained in the act. But other words which are contained in it would not have been added if *another* important change of system had not been intended. In another part of the act an altogether distinct provision is made for accepting *volunteers* if offered for this period of nine months. The intended change of system was, therefore, as to militiamen *to be drafted* for the new term of service.

Another argument is, that the object of the act is only to remedy defects and establish uniformity in the *enrollment* of the militia, and that when this purpose has been effected, the subsequent draft and its consequences are left to the unchanged operation of the former system. The act, however, enables the President, if either the State laws, or *their execution*, should be defective, to make regulations "for *en-*

rolling the militia, *and otherwise* putting this act *into execution.*" The purposes of the act extended, therefore, beyond the mere enrollment. What were these ulterior purposes? The answer is, that they were to provide for a draft, and for one that should be effectual.

The drafting would not have been effectual without a power to compel the attendance of those drafted at a rendezvous or place of muster. Under the former system their attendance at such a place could not be enforced. The intended change of system was that it should be enforceable. The law, therefore, expressly enacts that the militia called forth "*shall* be *mustered in.*" It is true that these words are contained in a clause of the act which designates the term of service. It is argued, but, I think, inconsequentially, that they have, therefore, no other effect than to fix the period of mustering as that from which the computation of the time of service is to begin. This certainly is not the phraseology; and I think that it is not the intended effect. The act of 8th May, 1792, had provided that no militiamen should be compelled to serve more than three months in any one year; and the act of 28th February, 1795, that none should be compelled to serve more than three months *after his arrival at the place of rendezvous* in any one year. The clause in question, after authorizing the President to specify in his call the period of service required, not exceeding nine months, enacts that the militia so called *shall be mustered in,* and continue to serve for the term specified, unless sooner discharged. If the former system had been continued, the enactment would, according to the former phraseology, have made the time computable from the period of their being mustered in, or from that of their arrival at the place of rendezvous. But, in that case, the form of expression, *shall be mustered in,* would have been avoided. Its adoption, in view of the course of reasoning of the Supreme Court, in 5 Wheaton, 20, 21, upon the acts of 1792 and 1795, cannot be regarded as immaterial or as having been unintentional.

The purpose of the act of July, 1862, must, therefore, have

been that the men drafted under it should be compellable to serve. The words have this, and no other, fair import.

It is objected in argument, that for the delinquency of not attending, under this act, at the place of muster, the same penalties which were imposed under the former acts may still be inflicted. This being assumed, the argument is, that as the act does not expressly subject the delinquents to any other military restraint or discipline, none can be imposed by implication. Assuming, for the present, that the same specific penalties might, under the former laws, or one of them, be inflicted upon delinquents under the act of July, 1862, the answer to the objection would be, that such a liability to specific military penalties is not in itself inconsistent with an ulterior continuance of subjection to military discipline and military restraint. Therefore, though the same penalties were still specifically enforceable, the consequence that military subjection under the latter act must cease upon their infliction would not follow. The main question under this act is not one of implication. The question is, whether its words do not establish, from the time of notice of the draft, a military relation of which ulterior as well as immediate subjection to military discipline and restraint is a lawful incident. This question has already been considered. If the words have rightly been so understood that due effect cannot be given to them unless the existence of such a military relation is recognized, the objection could not prevail, though its premises were correctly assumed.

But the question is resolvable more simply, if the specific penalties of the former acts are to be considered as applicable only to militiamen called upon for service in the mode and for the respective periods prescribed by those acts. If this be so, the immediate subjection of persons drafted under the act now in question to *general* military law, *including* their liability to compulsory military restraint and organization, is the only means of enforcing the act that can have been intended by Congress. Now, in every one of the three former acts, the section imposing these penalties is repeated,

with no change of expression which can here be regarded as material; but it is not re-enacted by the law in question. Moreover, in every one of the former acts, it *follows* the sections which prescribe the mode of calling the militia forth, and the term of their service, and, in every one of them, is expressed in words of enactment, "that every officer, non-commissioned officer or private of the militia who shall fail to obey the orders of the President in any of the *cases before recited*, shall forfeit," etc. Independently of differences in the modes of calling into service, the difference in the term of service under the act in question takes the case out of the definition of a *case recited* in any of the former acts. The only former act in force on this point was that of July of the year preceding the act in question. Both acts, that of July, 1861, and that of July, 1862, are now in force. No man called under the system of the former act into service, after the first week in June in any year, can be required to serve as long as nine months, unless an act of Congress, passed within sixty days after the commencement of a session, should prolong his term of service; and the term is shortened as its commencement approaches the commencement of a session of Congress. Under the act in question, the term of service, if so defined in the call of the President, is nine months. This case had not been mentioned in the act of 1861, or in any prior act. It is difficult to conceive that Congress would, in 1862, have omitted to re-enact the former provision concerning penalties, as was done in 1861, if the purpose of the system was, in this respect, unchanged.

Here, however, it is objected that, under the system of conscription for the regular army, prescribed by the subsequent act of 3d March, 1863, a person drafted may obtain exemption from the military service, either by furnishing an acceptable substitute, or through a pecuniary commutation for one—the amount not exceeding a certain uniform sum, to be designated by the Secretary of War. The argument is that this indicates a continuance of the system of pecuniary

equivalents established under laws prior to the act of July, 1862, which act should, therefore, be so interpreted as to maintain, in this respect, a conformity in the entire system of legislation. If this assumed conformity of the act of March, 1863, and the laws prior to the act of July, 1862, could be established, the argument would not have any force unless the words of the act of 1862 were doubtful or obscure. But the supposed conformity does not exist. Under the act of July, 1862, the administrative details of the draft were so regulated by the President, through the war department, that a person drafted might obtain an exemption by offering an acceptable substitute. Such an executive regulation was properly made under the express authority conferred by the act. But, without further legislative authorization, a pecuniary commutation could not have been substituted by the executive organ of the government. Such a commutation, unless for the purpose of obtaining with the money a proper person to serve as a substitute, would have been foreign to the purposes of the act of 1862; and that act does not authorize a receipt of commutation money to be used by the executive department as a bounty fund for enlistment. Such a receipt and application of such money through the war department is precisely what the subsequent conscription law for the regular army has authorized by the provision relied on in the argument. The enactment is that any person drafted and notified may furnish an acceptable substitute, or pay "such sum, not exceeding three hundred dollars, as the Secretary may determine, *for the procuration of such substitute*, which sum shall be fixed at a uniform rate by a general order made at the time of ordering a draft for any State or Territory." Thus, the rate may vary in different States or Territories, with local differences in the bounty money that will obtain a substitute. The commutation money must be fixed by the Secretary of War, at an amount sufficiently great to enable him to procure with it a recruit. When paid, it does not, like the penalties under the former system, pass into the treasury; but becomes a fund

at the disposal of the war department, not for its general expenses, but for the specifically defined purpose of procuring a substitute for the exempt. The money is neither a penalty for non-attendance, nor an arbitrary equivalent for the military service originally due, but such an absolute equivalent for a military substitute as will afford the sure means of obtaining one in place of the exempt.

The subject of the act of 3d March, 1863, is more simple than that of the act of 17th July, 1862, which is complicated with relations to the States and the operation of their existing militia systems. The act of 1862 was passed on a sudden and unexpected emergency. The system of regulations to carry it into effect must have been hastily, and may have been crudely, organized. The system, under the act of 3d March, 1863, is more matured in its details than any system which could have been organized for the militia under the executive regulations authorized by the former act. The interpretation of this former act should not, however, be influenced by the obvious magnitude of the difficulties in carrying the executive regulations under it into effect. Nor should a retrospective effect be given to the subsequent law by comparisons of these regulations with its enactments. The subjects of the two laws are different. Their operation may be, in some respects alike, in others, different.

The legislative intention having been ascertained, the remaining inquiry is, whether it can take effect.

The counsel for the petitioner contend that the Constitution did not authorize the delegation by Congress to the President of the authority to make regulations on the subjects of the act of 17th July, 1862; and also that if the authority was constitutionally conferred upon him, he exceeded it in sub-delegating its exercise to the Secretary of War. They also contend that there was no authority for the ulterior delegation of powers to the governor of the State, and for his exercise of them through local commissioners, under the rules prescribed by the War Department. In

considering these points, the above order in which they were argued, will be inverted. As to whatever may concern existing or expectant relations of militia of a State to the general government, the governor of the State, as her chief executive magistrate and as the commander-in-chief of the militia, may, except under extraordinary circumstances, be properly communicated with by the President through the War Department. This is peculiarly the case when bodies of the militia are to be called into the service of the United States. The President, in calling them forth may address the orders directly to their immediate commanders. But the more proper course must almost always be to communicate his orders through the governor. Ordinarily the former course had been to make known to him, through the War Department, or otherwise, the force required, and leave to him the selection of the bodies of militia who should compose it. The President having addressed an order to the governor, may indeed, be unable to enforce the observance of it compulsorily against him, unless he is actually in the field as commander of the militia of the State. (5 Wheaton, 15, 16, 17, 37 to 43, 46, also 24 How. 107.) The President must, in such a case, act as the occasion may require, without the intervention of the governor. In the present case, nothing of the kind occurred in Pennsylvania. The authority vested in the President by the act of Congress, to make such regulations as defects in State laws, or in their execution, might render necessary to carry the purposes of the act into effect, could not have been conveniently exercised independently of the governors of the respective States. The requirements of the President, through the War Department, were such as the governors were the most proper officials to execute. They may not have been compellable to execute such requirements, or to execute them through local commissioners, or in any other specified mode. But, if the governor of a State, in compliance with such requirements, whether communicated in the form of orders, or in any other form, saw fit thus to co-operate in executing the purposes of the act, his

intervention was lawful; and nothing could be more proper.

As to the intervention of the Secretary of War, if the President had the power to prescribe administrative regulations, this power was exercisable by him through the proper executive organ of the government, which was, in this case, the War Department. The head of this department was a proper officer for organizing the draft, so far as the authority of the President extended, and, also, for making the regulations of the draft public. When they were made known through the Secretary of War, they were, therefore, to be considered as acts of the President.

The proper inquiry, therefore, is, whether they were such regulations as Congress could authorize the President to make. Regulations of some kind were necessary. The details of a compulsory draft could not be simple; and there was no practical experience of such a system. Of course, Congress cannot constitutionally delegate to the President legislative powers. But it may, in conferring powers constitutionally exercisable by him, prescribe, or omit prescribing, special rules of their administration; or may specially authorize him to make the rules. When Congress neither prescribes them, nor expressly authorizes him to make them, he has the authority inherent in the powers conferred, of making regulations *necessarily* incidental to their exercise, and of choosing between legitimate alternative modes of their exercise. Whether his authority extends further, and enables him, without express authority from Congress, to make regulations which, though incidental, are not necessarily so, is a different question. When, however, Congress, in conferring a power, which it may constitutionally vest in him, not only omits to prescribe regulations of its exercise, but, as in the present case, expressly authorizes him to make them, he may, within the limits of, and consistently with, the legislative purpose declared, make any such regulations incidental, though *not necessarily* so, to the power conferred, as Congress might have specially prescribed.

In 1812, Congress, in declaring war against Great Britain, authorized the President to issue letters of marque and reprisal; and a few days afterwards, authorized him to revoke any such as he might afterwards grant, and to establish and order suitable instructions for the better governing and directing the conduct of the vessels so commissioned, their officers and crews. The President thereupon issued such "instructions to private armed vessels" as, independently of this authorization by Congress, might, perhaps, have proceeded from him as the constitutional commander-in-chief of the navy. But he issued a second instruction to privateers when information was received that Great Britain had, after the declaration of war, but before knowledge of it, repealed her orders in council, and that, under a belief that the repeal would induce a suspension of hostilities by the United States, large shipments of merchandise had been made from England for this country. Vessels belonging to citizens of the United States laden with such merchandise were liable to capture and condemnation for being engaged in trade with enemies. The second instruction prohibited the capture of such vessels as had thus been laden with British merchandise, in consequence of the repeal of the orders in council. The Constitution had conferred upon Congress, and not upon the President, the power to make rules concerning captures. The question arose, whether such a capture as the President had thus prohibited was made unlawful by his prohibition. The argument for the validity of the capture was, that the authority to give instructions to privateers conferred by Congress on the President had been intended only to enable him to regulate the conduct, and prevent the misconduct of privateersmen, and not to limit or diminish their rights of capture, much less to impair the belligerent right of their nation to confiscate captured property of her citizens embarked in trade with her enemies. The President, as commander-in-chief, might regulate the conduct of the captors, but it was contended that he could not, by an executive act, declare what should be lawfully a subject

of capture, because this would encroach upon the constitutional power of Congress to make rules on that subject. The Supreme Court thought that the question of the President's authority as commander-in-chief to issue such instructions would have deserved grave consideration, if the decision of it had been required, but that no such decision was necessary, because, *under the act of Congress*, he "had *full authority* to issue the instruction," (8 Cranch, 427, 428). The citation of congressional and judicial precedents which sustain legislative grants of authority to make administrative regulations, general and in detail, and to carry them into effect, might be multiplied almost beyond measure. The rules prescribed through the War Department under the authority of the act in question did not exceed the proper limits of administrative regulation of their subject.

The petition in this case was for a writ of habeas corpus, to be addressed to persons described as military officers; and alleged, in general words, an illegal restraint by them of the petitioner under a pretended authority of the United States, or of the President. When the petition was presented at chambers, in the afternoon of 24th instant, I doubted the propriety of sanctioning a proceeding in such a form as might enable any soldier under military arrest—or any civilian arrested under military authority when within the lines of a camp, or other place in actual military occupation—to demand, as of course, a writ of habeas corpus to be addressed to any military custodian. The authority of courts of the United States to issue writs of habeas corpus is more limited than that of the State courts; and I am not in the habit of granting the writ in any case without sufficient reason to believe that it *may* be a case proper for the exercise of the jurisdiction.

I suggested to the counsel of this petitioner that, in the absence of an averment or affidavit that he was not a person in military service, and with no statement of any specific reason for issuing the writ if he was in such service, I would hesitate to grant the writ, unless the case were one in which

delay might be injurious. I said, that, if it were such a case, I would not regard any defect of mere form, but would issue the writ at once upon the present application, and the statement by counsel of any reason for issuing it that might have been specified in the petition or affidavit. The counsel then stated the case as it has been above detailed; adding that the petitioner had been drafted under a wrong Christian name, and that it was believed that unless the writ were issued, he would be removed from the district early on the next morning. I thought the misnomer, without a denial of the identity of the party, immaterial; but said that an argument might change this impression. As to the other points, my impressions were then such as have already been stated in this opinion. I said to the counsel, that if the probability of the petitioner's early removal had not been mentioned, I would not have issued the writ without first hearing an argument after notice to the law officer of the United States for the district. But, as the removal of the party was apprehended, I would, in a case where personal liberty was in question, grant the writ at once.

These proceedings at chambers have been mentioned in order that the course of practice, in ascertaining whether a habeas corpus can properly issue under the limited statutory jurisdiction of the court, may be understood. Whether a man is lawfully in military service must always be a judicial question. It is peculiarly a question for decision under a habeas corpus. Upon its decision the applicability or inapplicability of military law depends. But even where the principal inquiry is whether military service is due *to the United States*, important questions more proper for decision by a State court than by a court of the United States may sometimes arise, either incidentally or consequentially.

On the hearing in court it has appeared that the misnomer was not only in the draft, or notice of it, but also in the previous enrollment. This presents a question different from that which was stated at chambers. A partial misnomer in a draft made from a *proper* enrollment may perhaps be imma-

terial if the identity of the party is unquestionable. But, without an accurate enrollment, there can be no valid draft. An enrollment which is not an accurate list of names cannot be the proper material for a draft. The person drafted has not been in privity with the enrollment; but it has been the subject of proceedings by strangers to him; and through these proceedings the lot which falls upon him is cast. The Supreme Court of Massachusetts have decided that a misnomer in a militia enrollment renders it void as to the party misnamed. (3 Pick. 262.) In the case in which this was decided, the mistake was of such a kind as perhaps would not in some other States, have been thought a misnomer, (3 Peters, 5 to 7; 4 Watts, 329; 5 Johns. 84; see, however, 7 Watts & Serg. 406.) But this rule of decision is not affected because it may, perhaps, have been thus misapplied in a particular case. In the present case the misnomer was unquestionably material. The party's Christian name is *Cornelius*. By some of his relations and friends, he is familiarly called *Nele* or *Neely*. He is of Irish descent, and by some of these persons this familiar name is pronounced *Nale* or *Naly*. He was enrolled as *Naylor* McCall. In consequence of the misnomer, he must be discharged from custody.

A point not mentioned in the argument, is that, in Pennsylvania, the enrollment was of persons between the ages of twenty-one and forty-five years. Those between eighteen and twenty-one years of age were not enrolled. A question upon which I have, since the argument, bestowed some thought, is, whether the draft from such an enrollment was valid; in other words, whether those upon whom the lot fell were not entitled to the increased chance to escape from the draft of which this omission has deprived them. The reason of the omission was, that the militia law *of the State* required the enrollment in her militia of only persons between the ages of twenty-one and forty-five years. The omission from the enrollment of the names of persons between the ages of eighteen and twenty-one years, does not appear to have been sanctioned by the President or Secretary of War. The au-

thority from Congress in the act of 17th July, 1862, to make regulations would not have enabled the President to sanction the omission, because the grant of the authority is followed in the same law by an express re-enactment, so far as the present question is concerned, of the provision of the act of 1792, that the enrollment of the militia shall, in all cases, include all able-bodied male citizens between the ages of eighteen and forty-five years. This express enactment seems to have excluded the age of the persons liable to render military service from becoming one of the subjects of the exercise of the powers of *regulation* conferred on the President by Congress. The question is, whether the intervening State law authorized the disregard, in the State, of this enactment of Congress. Upon this question, as it has not been argued, no opinion can be expressed.

The prisoner is discharged.

DISTRICT COURT. MAY 9, 1863.

ADMIRALTY.

THE ELMIRA CORNELIUS AND CARGO.

Directions to assessors in the ascertainment of facts in relation to alleged violation of blockade.

PRIZE.

REFERENCE to assessors.

PER CURIAM.

So far as the decision of the case may involve a proper question for nautical experts I am, however, desirous of obtaining their assistance. Captains John H. Young and Enoch Brooks, experienced navigators, and both familiar with the coast in question, have attended the whole of the hearing. The evidence has been read and the arguments of counsel have been made in their presence. The former gentleman is one of the prize commissioners, and Captain

Brooks has, on the further proofs, been examined as a witness on behalf of the claimants. I request these gentlemen, as assessors, to state verbally, or in writing, as they may prefer, their belief upon the question whether the facts of the voyage from Port Royal are consistent with a destination in good faith for New York, continuing without wilful deviation until the time of capture, and whether, if a wilful deviation occurred it was under circumstances reasonably consistent with innocence of intention with reference to the blockade. These gentlemen will understand that the question is to be considered by them as a nautical and not a legal one. They may take into consideration the leaky condition of the vessel at Port Royal for what they may think it worth. They will disregard all statements by examinants of what they allege to have been said by the captain or supercargo. Where evidence conflicts, that of persons on board the captured vessel, particularly the captain and mate, will be considered as entitled preferably to belief. As to the direction of the wind, I observe a discrepancy in the statement of the mate in his examination on further proof and the statements of two of the naval captors. The statements of these captors are unsworn. The assessors will disregard all that is contained in them except concerning the direction of the wind, as to which the assessors will take it to have been either south-southwest, as in these statements, or southwest as in the mate's affidavit, as may be most favorable to the claimants. The assessors will reperuse the evidence as far as they may think necessary to enable them to reach just conclusions.

DISTRICT COURT. JULY 27, 1863.

ADMIRALTY.

THE EMMA AND CARGO.

1. Proof that an alleged destination is pretended, with absence of papers, is ground of condemnation for violation of blockade.

2. A letter from the claimant of specified property of small value may, with the consent of the District Attorney of the United States, be received and filed as a claim. A liberal practice prevails in this respect in prize cases.

PRIZE.

CADWALADER, J.

I cannot acquit this vessel and cargo upon the further proof which has been adduced from Baltimore. But I allow to the claimant unlimited further proof on all the points of the case, and allow forty-two days for its adduction. I also allow further proof on behalf of the United States on the question of deviation. Since the former hearings I have looked again at the preparatory proofs. There is no log book. But the want of one seems to be completely supplied by a paper on board, of the following effect

Lat. by obs.	Lat. by D. R.	Long. by Ac.	Long. by Chronometer.
25 36	25 37	75 23	75 23
00 00	27 26	76 13	76 12

The absence of any other log is perhaps accounted for in the mate's examination. He says: "I am not a navigator, though I acted as mate." The prize master states that the capture was made in *about* latitude 27° 15′ north and longitude 76° west. This does not vary materially from the last point of reckoning on the above-mentioned paper.

The master of the captured vessel states that his course at the time of capture was north northwest, and that he had been on that course about twenty-eight hours. If the course according to the same paper is traced backward this would

correspond with it. And if the course is traced further back to the beginning of the previous day we then find her at a point which might, in the due course of navigation, have been reached if she had on a day earlier taken her departure from a point a little outside of the southern extremity of Eleuthera.

The capture was made on 23d July, 1862. She had, as the captain states, taken in her lading between the 14th and 19th of that month at Nassau, and had afterwards taken some fruit on board at Eleuthera. If she left Nassau on or about the 20th and passed into the Atlantic Ocean by Exuma Sound, her course would have been past the southern end of Eleuthera. She may therefore have taken her departure from the point just beyond it on the 21st, and she might, without any deviation from the professed voyage to Baltimore, have been, on the 22d, at the point of the first reckoning noted on that paper. From this point the course about north northwest mentioned by the captain would, as it seems, have taken her to the place of capture. If this be so, an inquiry will be whether this was a deviation from the course for Baltimore, and with what probable destination. Upon the other inquiry as to the effect of the want of proper papers on board, and as to the bearing of certain evidence on the question of commercial destination for Baltimore, my views were sufficiently expressed at the former hearing.

OCTOBER 26, 1863.

The following supplemental opinion was filed:

In this case, the course of the adventure in question rendered Baltimore a most improbable destination of the cargo. The absence of documents relating to the cargo, particularly the want of an invoice, would, in the case of any voyage, have required explanation.

The course upon which the master deposed that the vessel had been for twenty-eight hours before capture shows, independently of the reckonings upon the piece of paper found

on board, that she must have taken the passage from Nassau round the southeastern extremity of Eleuthera, instead of the passage between that island and Abaco. The reckonings on this paper, which must, in the absence of a log book, be taken as a journal of the voyage, confirm conclusively this inference as to the course of the voyage. This being so, she was, when captured, about fifty miles out of her course to Baltimore, which would have been towards Cape Hatteras. The case was therefore one for either condemnation, or further proof.

The question as to deviation was fully stated in my former opinion. In further explanation on this point, I refer, as part of the present opinion, to the annexed chart showing the track of the vessel. The allowance for further proof twice made, and at this time long extended from the delay of the hearing, has resulted in the production of nothing on the part of the claimants to relieve the case of its doubts. In the meantime fourteen months have elapsed since the capture. The case is a clear one for condemnation.

It is morally and legally certain that the destination was for the blockaded coast.

Vessel and cargo condemned.

OCTOBER 28, 1863.

THE LETTER of J. W. Gaskill, addressed to the Judge of the Court, is presented and allowed to be filed, subject to all legal exceptions; whereupon

THE JUDGE said:

There was, in this vessel, at the time of her capture, a bag of silver coins amounting to the sum of $177, which were claimed by her master as his private adventure, though he has never interposed what can be technically designated as a claim for them. According to the usual course of practice, a formal claim for the restoration to a master of his private adventure of small value is not necessary, and with the consent, in all cases, of the District Attorney of the United States a very liberal practice on the subject has prevailed.

The practice has been upon an informal application by the master to proceed summarily to an inquiry and decision. The proceeding in most cases has been by way of reference to one of the prize commissioners with a direction to investigate the subject, and a further direction if the application should prove to have been founded in truth to restore the subject of it to the master . . . reporting to the court what may have been done under the reference. This practice appears to be liable to no objection when the subject is of small value.

In the present case the subject is mentioned by the prize master in his affidavit returned by the commissioner. The subject was once mentioned in presence of the District Attorney, when the remark was made, perhaps by the court, that the amount of the silver bore to the value of the vessel and cargo a much greater proportion than had been usual in the cases in which there had been a restitution under summary proceedings according to the above-mentioned practice.

Thus the matter has rested for about two months. I have received from the master a letter dated the 9th instant, from which I learn that he has been and still is in confinement as a prisoner out of the district. The case, if the money is to be restored to him, is one of great hardship from the past and continuing detention of his funds. I have, in other cases, remarked upon the irregularity of epistolary communications to judges. But I have also had occasion to say that in prize cases a necessity for acting upon such communications may sometimes occur. In the present case, the Attorney of the United States consents that the letter may be filed and stand as a claim. Under the circumstances of the case, I allow it so to stand, and refer the application of the claimant to the prize commissioner, Mr. Flanders, to ascertain the facts and report generally upon the subject.

DISTRICT COURT. JULY 31, 1863.

ADMIRALTY.

THE THOMAS STANLEY.

1. A vessel about midnight collides with another at anchor. The weight of testimony was that there was a light on board the anchored vessel and that the colliding vessel had not a proper lookout. *Held*, that the negligence was that of the colliding vessel which was alone responsible.
2. Scope of inquiries of nautical assessors.

CAUSE OF COLLISION.

THIS CASE having been heard upon the proofs and arguments of the respective advocates, the Court asked the nautical assessor to consider the evidence and answer, verbally or in writing, the following questions:

1. Whether the evidence leaves on his mind any doubt that there was, at the time of collision, a light properly set in the vessel at anchor.

2. Whether a movement, or attempted movement on her part, at the crisis of peril would have been justifiable.

3. If it would have been justifiable, was it requirable under any nautical rule or usage?

ANSWERS having been made,

THE JUDGE said:

I am aware that the tendency of the present practice of this court is towards an unprecedented extension of the scope of inquiries by nautical assessors; and I am doubtful whether the proper limits of references to such assistants were not exceeded in this case. Had the answer of the assessor to any of the three questions been different from that which has been returned, I would probably have decided the case in opposition to his opinion.

It is clear, I think, that there was not a proper lookout by the two men in the fore part of the colliding vessel, either from inattention or because they were not properly stationed on opposite sides of her. The man at the helm would not

necessarily have seen the light in the vessel at anchor in season to have avoided the danger. The other witness of those on board of the colliding vessel was not on the lookout when he first discerned the anchored vessel. The crisis of peril was then arrived. If there had been a proper lookout for a light before the anchored vessel was discerned, the negative evidence of those who did not see the light would perhaps require careful consideration. But that those who unexpectedly discovered a vessel at anchor on which they were bearing down should not recollect having seen a light at that moment is not surprising and has no strong tendency to contradict the affirmative testimony that there was one. If the tendency had been stronger the negative evidence would be rebutted by the admissions of the captain of the colliding vessel as to the light. The whole of what he said is not reasonably referrable, as the respondent's counsel has argued, to a light put up after the collision had occurred. That the light was set in the early part of the evening is proved, and the assessor states that until an hour after midnight it would not have required trimming. The collision cannot according to the testimony have occurred after midnight. Independently of the opinion of the assessor, I think it impossible to doubt that there was a proper light in the anchored vessel.

To the second and third questions, a simply negative answer might have been returned. The additional remarks of the assessor serve as an explanation rather than qualification of such an answer. A movement in obedience to a requirement from the approaching vessel would not have been a movement *on the part of* the anchored vessel.

The case is a clear one for a decision in favor of the libellant.

Decree accordingly.

DISTRICT COURT. SEPTEMBER 9, 1863.

HABEAS CORPUS.

ANTRIM'S CASE.

1. A statute which, in relation to summary proceedings before a military commission, enacts that its decision shall be *final*, does not necessarily make the decision *conclusive* as to the *right* which was in question.

2. The provisions of the 14th Section of the act of Congress of 3d March, 1863, ch. 75, requiring the presentation, by drafted persons, of all claims of exemption to the Board of Enrollment, and making the board's decision *final*, do not, in the case of an exempt whose claim of exemption has been duly presented to the board and disallowed, preclude the subsequent consideration, under a writ of *habeas corpus*, of the question of his *right* of exemption.

3. *Quære:* Whether the question will be considered under such a writ at the instance of a party, who, having had proper notice and opportunity, has not presented his claim of exemption to the board, or has failed to comply with its reasonable regulations, of which he has had proper notice, or of a party who, after a rejection of such claim, and full subsequent time and opportunity to obtain an unobstructed judicial investigation of the question of alleged right, neglects to apply for the writ until after he has been mustered into military service.

4. The act of Congress of 3d March, 1863, for the purpose of raising national armies independent of the militia of the States is constitutional.

5. Congress cannot constitutionally delegate its own powers; but may confer executive and judicial powers upon those respectively who are, according to the Constitution, qualified for their exercise.

RETURN to Habeas Corpus.

CADWALADER, J.

The provost marshal of the proper district returns to the *habeas corpus* that the petitioner was duly drafted and notified; appeared before the board of enrollment asking exemption as the only son of a widow dependent on his labor for support; was duly heard upon his allegation and evidence, and that his claim of exemption was finally disallowed; that he subsequently appeared and reported himself for duty; received his uniform; asked and obtained leave of absence for a time not quite expired when the return was made; and, though not in the respondent's actual custody, was still under his control.

No question as to the effect of the occurrences posterior to the disallowance of the claim of exemption is properly raised by this return. These occurrences are not so stated in it that a traverse of them is necessary. Whether proof of them will ultimately be receivable against the petitioner, if proofs on his part of his alleged right shall have been admitted in the first instance, may be a question to arise hereafter. In the meantime, the question of the sufficiency of such a statement of these occurrences in a return is different. As acts of mere submission to military authority, where obedience would have been compellable, they can add nothing to the effect otherwise attributable to the decision of the board. His temporary acquiescence in it was no waiver of right. But, if the occurrences are mentioned for the purpose of showing that, notwithstanding his previous *claim* of exemption, he afterwards *waived* any *right* of exemption that he may have had, so as *voluntarily* to become a *soldier under the draft*, the *voluntary waiver* should have been directly averred. In a return, a statement of occurrences merely *tending*, more or less, *to prove* such a fact, is not of equivalent effect. Sometimes, indeed, a fact consists of a series of connected, or mutually dependent, occurrences. They may then be stated in detail. But such a specification of the details of a fact is different from a mere specification of evidence, tending to prove it. The proposition or fact relied on, whether stated in detail or in that general form which is ordinarily more proper, should be set forth substantively so that the statement, if true, shall absolutely suffice in law. The occurrences mentioned in this latter part of the return, under the most favorable view of it, may or may not, independently of those previously stated, suffice to establish a waiver of right. This part of the return, therefore, does not require a traverse. The objections to it might not apply to returns properly framed in order to meet cases of drafted men who, after proper notice, have omitted to appear before the board and claim exemption, or of those appearing and claiming it, but omitting to comply with proper regulations

of the board, of which sufficient information has been given. To cases of drafted men who, after the board's disallowance of their claims of exemption, have had fair time and opportunity to obtain elsewhere the judicial investigation of their alleged rights of exemption, and have not availed themselves of such opportunity, returns might perhaps be so adapted as to prevent unnecessary judicial interference with consummated military organizations embracing such parties.

The question upon the return is whether the military board's disallowance of the claim of exemption must be traversed; in other words, whether this board's decision that there was no right of exemption precludes inquiry here as to the existence of the right. This question depends upon the effect of the fourteenth section of the act of 3d March, 1863, ch. 75, which enacts "That *all persons drafted and claiming exemption* from military duty on account of disability or *any other cause*, shall present their claims to be exempted to the board, *whose decision shall be final.*" Cognizance of the application for exemption, if taken, must be *judicial* however special the jurisdiction or summary the proceeding. The point in question is whether the decision is or is not conclusive elsewhere as to the *right* of exemption. This depends on the effect of the word *final.* It certainly imports that the decision of the board shall not undergo executive or other revision. The decision is, relatively to *military* jurisdiction, *conclusive* as well as final. Therefore a decision of the board *in favor* of the claim of exemption, is necessarily conclusive as to the right of exemption. The question will be whether the effect of the words should be extended so as to make a decision *against* the claim equally conclusive against the *right.* The consideration of this question will involve the inquiry whether an enactment that the decision of such a tribunal shall be *thus* conclusive, would be constitutional.

The act of 3d March, 1863, has provided for the organization of an exclusively national military force by enrollment, *draft*, and, where necessary, *impressment;* that is to say, compulsion to serve. The words of this act, which might other-

wise be of doubtful import, must be interpreted so that usurpation of power, beyond the legislative authority conferred by the Constitution, may not be unnecessarily imputed to Congress. The case has been commendably argued on this point, upon the words of the Constitution and of the statute, without any such references to Congressional debates, or to debates of those who drafted the Constitution, or of those who proposed or discussed its early amendment, as, of late, have, perhaps, been too frequent. Such references to extrinsic matter, it is true, are not always improper. They are sometimes of legal assistance in explaining the meaning of *words* which are to be interpreted. This meaning may depend upon some relation of the words to occurrences of which historical memorials are preserved in the reports of cotemporaneous discussions. Where, moreover, the meaning of a word is doubtful, or has undergone change since the date of its use, the language of such discussions may sometimes serve, in some degree, the purpose of a glossary. Such cases are, however, not exceptions from, but, on the contrary, exemplify the rule that the intention is ascertainable from the *words* only. Under this rule, the proper inquiry is, not what may, from extrinsic sources, appear to have been intended by the men whose words are in question, but what was the legal meaning and application of the words when used. The rule applies where a single person has been the lawgiver, and with greater force of reason where a numerous assembly has made a law; and is applicable especially to the Constitution of the United States and the amendments. This Constitution was, when finished by its framers, as Chief Justice Marshall said, "a mere *proposal* without obligation or pretension to it." (4 Wheaton, 404.) We read, in the subsequent proposal by the first Congress, of amendments that the conventions of a number of the States had, in adopting the Constitution, expressed a desire for "*declaratory and restrictive*" additions (1 St. U. S. 97); and Chief Justice Marshall has reminded us that *almost every* convention had recommended such amendments. (7 Pet. 250.) The omission to

specify which amendments were declaratory and which restrictive enabled persons who differed most widely in opinion as to the effect of the original Constitution to concur in adopting ten of the series of amendments proposed. Otherwise they would not have been adopted. The hope of reconciling the differences of opinion was in future judicial decision upon the Constitution and amendments without any consideration of extrinsic matters.

The powers conferred by the Constitution upon Congress to raise and support armies, and make rules for their government, are distinct from the powers which are conferred in it as to the militia of the respective States. Until the act in question, the national armies had been raised by voluntary enlistment.

The system of enrollment and draft had long been matured as to the militia of the States. But, until the summer of 1862, the utmost penalty for not serving when drafted from such militia for the service of the United States had been pecuniary, with a limited imprisonment for non-payment. The act of Congress of 17th July, 1862, authorized impressment into the military service of the United States of those persons drafted from the militia under that act, who, when ordered to attend at a place of muster, disobeyed. The specific power of impressment had not been previously conferred. But, under the former system, though the fine for not serving had, when received, been considered an equivalent for service, the payment had nevertheless been enforced, or the penalty of imprisonment inflicted by courts-martial, when the money was not otherwise collected. The constitutionality of this former jurisdiction of courts-martial may be considered established. (5 Wheaton, 1.) It would not have been constitutional if disobedience to attend at a place of muster had not been a military offense. Congress, unless it had the power of absolutely subjecting a drafted person to military rule from the time of the draft, could not have thus made his disobedience before he was mustered into service a *military offense*. The act of Congress of 1795, which

fixed the time of arrival at the place of rendezvous as the period of the commencement of the military service, might, constitutionally, in the opinion of the Supreme Court, have made the time of draft the period. (5 Wheaton, 17, 18, 20; and see pp. 36, 37, 56, 64, 65.) The constitutionality of the act of 17th July, 1862, when the question was considered here in March last, in McCall's Case, appeared, therefore, to be established by authority. If the question had been thought an open one, the same view of the effect of the Constitution would have been taken.

The act of 3d March, 1863, has adopted a like system, on an extended scale, for the purpose of raising national armies independently of the militia of the States. Under the former laws which have been mentioned, a question such as that now under consideration could not arise. The question under those laws could only have been that of a military court's exercise of jurisdiction over a person who, having been lawfully drafted, already owed military service. There could not have been any dispute that the primary question whether he had been lawfully drafted or was liable to serve, was open to decision by the ordinary tribunals under a writ of *habeas corpus*. Here, however, the question is whether a military commission can so decide the original question of liability to serve, as absolutely to deprive all other tribunals of cognizance of it.

The enactments of the law in question are not so arranged that its provisions for the preparatory enrollment, and those for the draft, are always separated. They must, however, be kept distinct when they are considered with reference to the Constitution. The most unlimited system of mere enrollment could not be constitutionally objectionable; but a system of drafting might be arbitrary and latitudinarian to such an extent as to encroach upon constitutional rights. That the framers of the Constitution had inherited the parent nation's jealousy of the power to raise and support armies, appears from the prohibition to appropriate money to that use for a longer term than two years. The constitutional authority

to enact the law which is under consideration was derived exclusively from this power to raise armies. It cannot be enlarged under the authority which the Constitution also confers to make all laws necessary and proper for carrying the powers delegated, this one included, into execution. This incidental authority cannot extend beyond the limits of the principal power. A government previously republican, whose armies are, upon executive requisition, to be raised under a system of draft and impressment, administered without any restriction as to *persons liable to serve*, and without any limitation of the *time of service*, may, at the will of the chief executive magistrate, become an established military government. The Constitution guarantees to every State a republican form of government. The Supreme Court have said that a military government, permanently established in a State, would not be republican, and that "it would be the duty of Congress to overthrow it." (7 How. 45.) Congress, of course, could not establish such a government for the whole country.

The general provisions of the act are not unconstitutional. Those who are liable to do military duty under it are, in the first instance, described as all able-bodied male citizens, and persons of foreign birth who have duly declared their intentions to become citizens, between the ages of twenty and forty-five years, except persons rejected as physically or mentally unfit, and those exempted under seven other enumerated heads; the first including designated magistrates and other principal officers of the United States, and the others including respectively the private persons, whose rights of exemption are specified. One of them is the only son liable to military duty of a widow dependent upon his labor for support. No persons not thus excepted are to be exempt; but no person convicted of any felony can be enrolled or permitted to serve. The preparatory enrollment is biennial, to be made in the present year, and hereafter in each alternate year, and to embrace those only whose ages will be, on the first of July in every year in which it is made, between twenty

and forty-five years. They are to be enrolled in two separate classes, the first comprising all between the ages of twenty and thirty-five years, and all who are above the age of thirty-five and unmarried; the second class comprising all other persons liable to do military duty; and those in the second class are not, in any district, to be called into service until those of the first class shall have been called. All persons thus enrolled are subject for two years after the first of July succeeding the enrollment, to be called into military service, and to continue in it during the present rebellion, not, however, exceeding the term of three years. The President is authorized, whenever it may be necessary to call them out for such service, to assign to every enrollment district its quota of men to be furnished. In doing so, he is to take into consideration the number of volunteers and militia furnished by and from the respective States, and the period of their service since the commencement of the rebellion, and is to equalize the respective quotas by allowing for the numbers thus already furnished, and the time of their service. Upon such requisition of the President a draft is to be made, under his direction, of the required number, and fifty per cent. in addition. A roll of the names thus drawn, upon which they are to stand in the order in which drafted, is then to be made. The persons drafted are to be notified within ten days thereafter, and required to report at the rendezvous for duty. Provision is made for the acceptance of substitutes, and for the receipt of such commutation money as exempts those paying it, and enables the Secretary of War to procure substitutes for them. Provision is also made for the hearing and decision of claims of exemption; and it is enacted "that as soon as the required number of able-bodied men liable to do military duty shall be obtained from the list of those drafted, the remainder shall be discharged."

This review of the principal enactments of the law suffices to indicate its general purposes. The organization of armies under it is to cease on the termination of the civil war for whose exigencies it provides; and the term of service of those

drafted under it cannot exceed three years, though the war should continue longer. Such limitations of the time would have prevented the compulsory requirement of military service from being unconstitutional, though it had included every able-bodied male inhabitant. The administrative regulations of the law will next be considered.

The commission appointed for every enrollment district to execute the provisions of the act is designated in one section of it as the *enrolling board*, and in other sections as the *board of enrollment*. Biennial primary rolls, made by subordinate officers in the respective districts and sub-districts, having been reported to the board, are biennially consolidated into one list for each district. Of this list a copy is transmitted to the Provost Marshal General. The designation of the commission as the board of *enrollment* is referable not merely to these two stages of that preparatory enrollment, but also to the subsequent roll of the persons who have been drafted. This roll of drafted persons the board is required to make. The word *enrollment*, when used without any qualification, is, however, ordinarily understood as applicable only to the preparatory enrollment which must precede any draft.

The provisions of the 14th section, requiring the presentation of all claims of exemption to the board, and making its decision final, have been quoted. They do not apply to such a case of a person improperly drafted as depends neither upon a question of disability, nor upon one of exemption for any other specified cause. This opinion was acted upon in the cases of Stingle and of Robinson. Stingle was drafted as enrolled in the first class. He alleged that he belonged to the second, which is composed of persons not exempt, but not as yet liable to be called into service. Robinson was a person liable to enrollment in the first class. But on the enrollment from which he was drafted, his name and occupation were entered incorrectly. The decisions of the respective boards of enrollment had been that these parties were liable to serve. Both cases were very fully argued, as

the present case has also been. Stingle has been allowed to adduce proofs in support of his allegation that he was improperly enrolled in the first class. Robinson has been discharged from military restraint. The same decision was made in Tilghman's Case, where a resident of one sub-district, when sojourning in another, had been enrolled and drafted in the latter. These decisions do not affect the present question otherwise than as they may circumscribe it within ascertained limits.

Executive instructions and regulations have been greatly multiplied under authorities conferred by this act, and under assumed authorities which it has not conferred. These executive mandates, where authorized, have doubtless promoted various useful purposes, including that of securing a desirable uniformity throughout the United States, in the course and modes of proceeding under the act. The sixth section requires "the Provost Marshal General, with the approval of the Secretary of War, to make rules and regulations for the government of his subordinates," and perform other specified acts; among them, "to furnish proper blanks and *instructions* for enrolling and drafting." Under these two heads of *enrolling and drafting*, including their administrative incidents, executive instructions conformable to the purposes of the act, and to the provisions of the sixth section, are not less binding than if they had been contained in the act. But some of the executive instructions have, without any warrant in the act, assumed to regulate the exercise of the Board of Enrollment's duties as to applications for exemption under the fourteenth section. The exercise of this jurisdiction should be independent of regulation or other interference or supervision by any executive department of the government. Instructions of the latter kind, therefore, can have no imperative effect. This remark applies to the instructions which assume to regulate the practical *course of proceeding* of the board; and applies with greater force to those which assume to furnish *rules for its decision* upon questions of exemption. Some or all of those instructions which

apply merely to the course of proceeding may, nevertheless, have been reasonably and properly adopted by the respective boards of enrollment as their own rule of their procedure; and, through such adoption may, after proper notice to parties appearing to claim exemption, have become regulations observable by such parties.

This independence of executive supervision or interference is neither less nor greater than that of an ordinary court-martial after its organization, and before its finding or sentence. Such independence does not prevent the board of enrollment, even when administering its jurisdiction, under the fourteenth section, from being a mere military commission. Its president is the provost marshal of the district, whose rank, pay, and emoluments are those of a captain of cavalry, and who may, under the act, be an officer of this rank specially detailed. That such an officer may be thus detailed as a member, is conclusive as to the military character of the commission. The other members are the surgeon, who is also required by the act to inspect the drafted men at the rendezvous, and report on their physical condition; and a third person who, in another act of Congress, passed on the same day (chapter 79, section 5), is called a "citizen at large." Under the latter act, the compensation of these two members of the board is that of an assistant surgeon of the army. Under a subsequent executive regulation, all the members of the board receive their dues through the pay department of the army. The powers conferred on the board would have been exercisable with precisely the same legal effect as if Congress had conferred them upon any officer of the army who might be from time to time specially detailed as a sole commissioner.

The requirement in the fourteenth section that all claims of exemption should be made before such a local military commission is reasonable and convenient. Non-compliance with such a salutary provision, and with reasonable regulations made by such commissioners for carrying it into execution, might perhaps preclude such an inquiry as the peti-

tioner now asks. But he has fulfilled the statutory condition; and the question recurs whether the additional enactment in the fourteenth section that the decision of the military commission shall be final has precluded inquiry here as to his right which was in question before the board.

To the board's independence of *supervision*, which resembles that of ordinary courts-martial, this enactment adds an independence of such executive revision as the proceedings of courts-martial and of other military commissions ordinarily undergo. Their findings and sentences do not ordinarily take effect, even provisionally, till after such revision. The exigency of a legal application for the word *final* is fulfilled when it is understood as meaning *not subject to such executive revision*. This makes it conclusive so far as military jurisdiction can properly extend. But even the word *conclusive*, if it had been superadded in the act, would, perhaps, not have made a decision *against* the claim *conclusive* against the *right*. (6 Binney, 128; see 5 Binney, 387; 9 Barr, 102.) Upon the word *final* the question is more simple. There is no doubt that a decision may, relatively to the proceeding in which it was made, be *final*, and yet not conclusive elsewhere as to the *right* which was in question. (See 2 Peters, 463; 4 Serg. & Rawle, 211, 212.) This remark is applicable especially to such summary proceedings under a special jurisdiction as are those of this board.

The meaning of the word *final* in this enactment must, of course, be thus qualified, if its effect would otherwise be unconstitutional. The argument that it would have been constitutional is that it would have been so if no exemption from military service had been specified in the act; that the exemptions specified were therefore not of right; that an army might constitutionally have been raised, not by draft or lot, but by selection; that a power of absolute selection might therefore have been directly conferred upon commissioners or a commissioner; and that the exemption in question, being consequently of mere grace, can be claimed only in the mode and under the conditions imposed. This argu-

ment, if analyzed, will appear not to meet the constitutional difficulty.

The privilege of exemption is not the less *of right* because it has been legislatively conferred, or because it might have been altogether withheld. The mere form of the legislative enactment through which the immunity was obtained is, in this respect, immaterial. The right is conferred in the law by way of exception from a general enactment. This form of legislation, whatever opinion the lawgivers may possibly have entertained, cannot affect the substantive character of the right, and therefore cannot affect the question of constitutional power. As to privileges or immunities enjoyed through legislation, powers of government must be administered constitutionally, and their execution must be regulated in due subservience to judicial authority, exercisable through the proper organs. No power, otherwise unconstitutional, can, as qualifying rights, privileges, or immunities, legislatively conferred or vested, acquire validity through any legislative annexation, express or implied, of a condition to their enjoyment. Such a condition as would abrogate, or abridge, the effect of a constitutional provision as to the judicial power cannot be implied from any phraseology of the act in question.

If armies may constitutionally be raised by selection, as distinguished from lot, the proposition is immaterial, because, under such a system, the power of selection would be executive, and not like, that in question, which is judicial. If such a power should ever be conferred by Congress, its definite character, the prescribed methods of its exercise, the official character of those exercising it, and the method of their appointment, might become subjects of judicial consideration.

Congress cannot constitutionally delegate its own powers; but may confer executive and judicial powers upon those respectively who are, according to the Constitution, qualified for their exercise. Those qualified, except a single class, must be such officers as are nominated to the Senate, and

appointed with its consent. Those of the excepted class are designated as *inferior* officers. Their *capacities* must necessarily be tested and limited in every case, with special relation to authorities which are, according to the distribution of the powers of government, superior. In the distribution of the judicial power, Congress may establish inferior courts. But judges of such courts are not in the class of those inferior officers who can be appointed or designated without reference to the Senate. Therefore, independent judicial powers could not be vested by Congress in such a commission as the board of enrollment unless it is regarded as a tribunal simply military. Thus regarded, it can have no jurisdiction except over persons who are already under military rule. Whether a person is or is not under such rule is a question which a military tribunal may often have occasion to consider, and, so far as may concern its own proceedings, to decide. The tribunal may or may not be so organized that its decision of such a question is, relatively to military jurisdiction, *final*. But an act of Congress making such a decision as to the *status* of a citizen *final*, in such a sense as to preclude altogether judicial cognizance elsewhere of the question, would not be constitutional. Such a law, if thus executed, would confer a judicial power not warranted by the Constitution. Congress cannot give to such a mere military commission, or to a simple court-martial, any jurisdiction over a person who is neither in military service, nor locally amenable to the military police of a territorial space properly occupied for military purposes. Nor can Congress confer upon such a special tribunal the power of conclusive adjudication, whether a case is within its own jurisdiction.

An argument in support of the return has been that, as to persons drafted under this act, the fourteenth section may, at a time like this, of rebellion, take effect constitutionally by suspending the privilege of the writ of *habeas corpus* If this had been the intention of Congress, it might have been simply, and would doubtless have been directly, expressed. An intention to frustrate a right by indirectly suspending a

remedy, is not imputable to Congress. Moreover, such legislation would not well comport with another act passed on the same day, authorizing, during the rebellion, the suspension of this privilege by the President, but requiring a sworn return of a detention in custody under his authority. The question of right is dependent more, perhaps, upon the amendments to the Constitution than upon that provision of the original instrument which restricts the power to suspend this privilege. If the point were attended with any difficulty, the amendments might, in this respect, require full consideration. But I do not think it necessary.

The return does not require a traverse.

DISTRICT COURT. SEPTEMBER 14, 1863.

EXTRADITION.

TRAUGOTT MÜLLER'S CASE.

1. The treaties between the United States and certain European States for the mutual extradition of fugitives charged with certain crimes, do not require that an application for extradition shall have been preceded in the country of the government making it, by a charge, or public accusation, of equivalent effect with an indictment.

2. It suffices that there has, within the jurisdiction of the country making the application, been an authorized proceeding under which evidence has been, or might lawfully have been, taken there, with a view to a criminal prosecution, or to deciding whether to institute one.

3. Depositions preliminarily taken there with such a view should, if certified according to the act of 22d June, 1860, or otherwise duly attested, be admitted in evidence if they would be receivable in evidence there in support of a charge of a crime cognizable under such a treaty.

4. The crimes are named in the treaties with reference to known definitions in the system of general jurisprudence. But the specific applications of the definitions are determinable in particular cases, by the jurisprudence and legislation of the respective places of arrest.

5. In the United States, the jurisprudence and legislation must, under a charge of the forgery of a private writing, be those of the State of the Union in which the arrest is made.

6. The application for extradition may be sustained under a law of the State enacted after the date of the treaty, but in force at the time of the commission of the offense, and at the time of the hearing under the application.

7. A discharge of the accused party, under a previous application for extradition upon the same charge, heard in another State, does not preclude the renewal of the application, where the case does not appear to have been fully investigated and considered under the former proceeding.

WARRANT OF ARREST.

STATEMENT.

The case arose on a complaint made by the Consul for Saxony, on which a warrant for the arrest of Müller was issued.

Müller had been a resident of Rothenkirchen, Saxony, and, at one time, a tradesman in good standing there. His offense consisted in making and procuring to be made forged endorsements of negotiable paper. He had been discharged under a similar proceeding in Ohio, seemingly upon technical grounds in the reception and consideration of evidence.

The case was heard before the District Judge, and afterwards, at his request, was re-argued before himself and the Circuit Judge.

The opinion of the Court was delivered by

CADWALADER, J.

Of the treaties now in force on the subject of extradition, the earliest is that of 1842, with Great Britain. Its form has, in general, been followed in the others. An occasional recurrence to it will prevent their phraseology from being applied with too much latitude. But an adherence to it so close as to exclude reasonable cosmopolitan interpretation of them should be not less avoided as too narrow.

In this case, at the hearing in July last, the proofs of identity showed that the person arrested was the party against whom the charge is made on behalf of the Government of Saxony. There could be no doubt that he was the person who, under a former application made on the part of the same government, on the same grounds, before the judge of like jurisdiction for the Southern District of Ohio, had there been

discharged from custody. Except the proofs of his identity, the evidence offered there and rejected, was the same as that which has here been adduced and admitted. The jurisprudence and legislation of Ohio on the subject of forgery were, for all the purposes of the case, the same, in effect, as the jurisprudence and legislation of Pennsylvania. The sufficiency, also, of evidence, to justify an apprehension and commitment for trial, would, in each State, as may be assumed, have been determinable by the same rules, if the offence had been charged as committed within her limits. I was, nevertheless, of opinion that the discharge in Ohio had not precluded a renewal here of the application. But this opinion was not founded upon any such literal interpretation of the treaty as would make its meaning dependent upon simple and rigid analogies to cases of commitment for trial by magistrates here and in England, on preliminary charges of crime, after previous refusals of magistrates to commit. I thought, on the contrary, and still think, that the personal *status* of an inhabitant of, or a sojourner in, the United States, might be too irrevocably involved in the result of a question of extradition to make so narrow a rule of decision sufficient for the exigencies of such a question. I therefore thought that there might be a case in which the previous rejection of such an application by such a judge would perhaps preclude its renewal—especially in the same judicial district, or in another judicial district of the same State—but that this was not such a case.

The other questions were those of the sufficiency of the charge, and of the sufficiency of the proofs.

How, and how far, the crime in question must have been the subject of a *charge* or public accusation, in the country whose government asks the extradition, does not appear distinctly in the treaties, or in any opinion of the Supreme Court of the United States. The subject has been discussed elsewhere, but not satisfactorily. Its difficulties, are, in part, removed by the acts of Congress of 1848 and 1860. The argument that there must have been some authorized public

accusation of equivalent effect with what is here, and in England, called an indictment, cannot prevail. To adopt such a rule, would interpolate in the treaties a condition requiring what might, in some countries, be considered objectionable as a partial prejudication of guilt in cases to be afterwards tried. The treaty with Great Britain certainly requires no previous indictment or presentment. Between the United States and that country, such a condition, if intended, would have been expressed. In Kaine's Case the only process had been a warrant issued in Ireland under an *ex parte* deposition. The warrant had not been executed, service of it having been successfully evaded. This warrant and a copy of the deposition, certified and attested under the second section of the act of 1848, appear to have been thought sufficient, together, to satisfy the requirements of the treaty. (14 How. 105, 108, 109, 115, 116.) These requirements might, on either side of the Atlantic, be satisfied without even a warrant. Thus, in Pennsylvania, as in England, a constable or other officer may make an arrest for murder or robbery, on the spot, without a warrant, and may bring the party arrested at once before a magistrate, by whom depositions under the statutes of Philip and Mary may be taken forthwith. (6 Binney, 318; 8 Serg. & Rawle, 49; Baldwin, 580; 4 Co. 40, b; 9 Co. 66, a; Ld. Ray. 1297; Dougl. 358; 6 Barn. & Cres. 635; St. 1 & 2 Ph. & M., c. 13; and 2 & 3 Ph. & M., c. 10; 3 Binn. 621.) The party thus arrested may, before any commitment, or any process against him, escape, and may afterwards be found on the other side of the Atlantic, within the jurisdiction of one of the contracting governments. Under the latter jurisdiction, the depositions, or duly attested copies, with proof that they were taken under such a summary proceeding, would sustain an application for extradition, if they sufficiently proved the commission of the offense. Copies of such depositions taken in England would, if certified under the act of Congress of 1860, be receivable in evidence here, under this act, if not independently of it. So far as concerns mere accusation in the coun-

try whose government makes the application, any proceeding in that country under which evidence has been, or might lawfully be taken there, with a view either to a future criminal prosecution, or to deciding whether to institute one, satisfies the requirements of the treaty. Under the act of 1860, depositions preliminarily taken with such a view should be admitted in evidence here, if they would be receivable in evidence there.

In this case, the proceedings in Saxony, through the verification of the Saxon authorities, attested by the Consul General of the United States at Leipsig, were duly authenticated; and it sufficiently appeared that before the Saxon tribunals having cognizance of the question whether this party should be apprehended and committed for trial, the depositions of which copies were certified would have been receivable in evidence.

The remaining question was whether these depositions would, within the meaning of the treaty, have sufficed to justify his apprehension and commitment for trial under a charge of forgery, if the offense had been committed here. They fully sufficed to prove the act which was charged. Such an act, wherever punishable as a crime, is properly classed as a specific offense under the general head of *forgery*. In the jurisprudence of Pennsylvania, at the date of the treaty with Saxony, this act would not have been punishable as a crime. But before its commission in Saxony, the Pennsylvania statute of March 31, 1860, § 169, had made such an act indictable and punishable as a misdemeanor.

In the series of treaties which have been mentioned, certain offences, including forgery, are named with reference to their definitions in the system of general jurisprudence. But the treaties require the specific application of the definitions to be conformable, in particular cases, to the jurisprudence and legislation of the respective places where the parties may be arrested; and likewise require the application of local rules of decision as to the sufficiency of the evidence. The act in question—though generically forgery wherever criminal—

might be specifically criminal in one place, but not in another. I thought that the question depended upon the law of Pennsylvania under the statute of 1860, and that the case, on the part of the Saxon Government, had, therefore, been made out.

There is no jurisprudence or common law of the Government of the United states. (See 7 Cranch, 32; 1 Wheaton, 415; 8 Pet. 658; 3 How. 104.) No legislation of their government, independently of the jurisprudence and legislation of the several States, can have been expected by those who made the treaties ever to give specific definition of certain crimes mentioned in them. No such legislation as to forgery of private writings, which is the offense here charged, can have been expected. As to this crime, and others, local definitions and rules might be not less different in Ohio and in Pennsylvania than in Scotland and in England, or might be more different. In framing the treaty of 1842 with Great Britain, these local differences must have been mutually considered by the governments of the two contracting nations.

I thought that the decision of the case could not be affected by the date of the Pennsylvania statute. It was posterior to the treaty with Saxony, but anterior to the commission of the offense charged. Local specific definitions of an offense, which may be safely applied, are those in force, both when it was committed and at the time of hearing. If their application is not *ex post facto*, the question whether they were in force at the dates of the respective treaties cannot be material. Diplomatic arrangements whose effect may depend upon internal regulations of the contracting States are almost necessarily dependent more or less upon prospective legislation. Such regulations are almost always liable to change in the course of internal administration. They may also undergo modification in order to meet occasional requirements of international comity, or of the conventional arrangements themselves. These requirements may be only honorary; and the legislation consequently optional. But the treaties require that such definitions and rules as are

from time to time observable under the local jurisdiction of each contracting government shall be applied by it in favor of the other.

The questions which have been reviewed, whether difficult or not, were important; and upon one, if not more of them, differences of opinion were supposed to exist. At my request, the case has been reargued on all the points before the Judge of the Supreme Court for the circuit and myself. The only question which has caused us any embarrassment is that of the effect of the party's discharge in Ohio. Had that been a decision upon the legal merits of the case, pronounced after full investigation and consideration of them, our opinion might probably have been that a renewal of the Saxon Government's application should not be entertained. But the proceeding there, so far as we know, consisted in the mere summary rejection of the evidence offered, for what reason we are not informed. The same evidence, with the proofs of identity, has been, so far as appears, considered for the first time under the present application. The act of 1848 should be interpreted, and the regulations prescribed in it administered, with reference to the *international* character of the obligation of extradition. The conventional obligation is not fulfilled where an application for extradition is, in any mode or degree, slighted by one of the contracting governments to which it has been properly addressed. This must be considered in a case like the present, where provisions of the treaty are executed through judicial organs of the latter government. We therefore think, that until a decision founded upon adequate investigation and full consideration, the proceedings, under successive applications for extradition are, in effect, if not in character, analogous to successive preliminary hearings before local committing magistrates under ordinary charges of crime.

On all the other points of the case we are of the opinion which I entertained at the close of the former hearing.

The prisoner was accordingly remanded into custody, to await the order of the President.

DISTRICT COURT. JANUARY 29, 1864.

ADMIRALTY.

THE NEW YORK AND BALTIMORE TRANSPORTATION LINE, OWNERS OF THE FRANKLIN, *v.* THE FANNY McHENRY AND THE AMERICA.

It is a rule of river navigation, that a heavily laden steam-going vessel has, in the absence of other controlling circumstances, the right to the river channel, and deviation therefrom should be made by vessels of lighter draught.

STATEMENT OF CASE.

THIS was a cause of COLLISION occurring in the Delaware River between what are known as the coal wharves and the Point house, a few miles below Philadelphia. Both vessels were greatly injured. The ship Fanny McHenry, under tow of the steam tug America, was coming up the river. She was a large sea-going vessel, heavily laden, with more than double the draught of water of the propeller and the canal boat attached to her. Both were in the ship channel of the river, which the Fanny McHenry was compelled to keep, having no sufficient depth of water on either side to enable her to tack with safety. It was otherwise with the propeller, owing to her lighter draught. She had, besides, the movement of the tide in her favor. She kept, however, in the deep channel until within 250 yards of the Fanny McHenry, when, finding collision imminent, the person in charge of her cried out, "Hard a port," which order the Fanny McHenry attempted to obey, and in doing so the vessels came in contact.

CADWALADER, J.

The only difficulty which might have been encountered in this case disappears when the evidence is applied to the diagram appended to the assessor's report. From this it appears that, however the course of the America, with the Fanny McHenry in tow, may, after the Franklin was seen, have tended towards

the right, this course merely placed the McHenry in the proper channel for navigation of a sea-going vessel of her draught. The motives of her navigator stated in the pleadings or evidence are therefore unimportant. She did not, in any nautical sense, alter her course until signaled from the Franklin to do so, and then did nothing but simply obey the signal. Of this the libellants cannot complain. The question which thus arises is whether the McHenry was not justifiable in keeping her course in the ship channel; in other words, whether the Franklin was not bound to give way to her. In general, a tug having only a canal barge in tow may, as compared with a tug having a heavy sea-going vessel in tow, be considered as an unincumbered vessel bound to give way to the other. If special considerations are entertained, the state of the tide adds force to the applicability of the general reason. Independently of the general reason, the Franklin, being of such draught as to be navigable without any reference to the shoals which necessarily restrained the course of the other vessel and having ample time and space to have passed her on either side, could not justifiably have expected her to alter her course, and was bound for this additional reason to give way. Her navigator, instead of doing so, assumed that the case was the ordinary one of two approaching steamers in an open channel, each bound to port her helm. In the assessor's opinion that he was mistaken I fully concur. Whether under the rule of decision established by the Supreme Court the answer can serve the purpose for which it was framed of a cross bill, is perhaps questionable. From the course of the argument I infer that the technical objection upon this point is waived on the part of the libellants. This being so, the libel will not only be dismissed with costs, but a decree against the libellants that the respondents recover their damages will also be entered.

Whether as to the latter part of the decree they should recover costs or not I do not decide.

On appeal to the Circuit Court the judgment of the District Judge was affirmed with costs.

PROCEEDINGS

In the Circuit Court of the United States for the Eastern District of Pennsylvania

IN MEMORY OF

HON. JOHN CADWALADER

January 27, 1879

Upon the opening of court after Judge McKennan had taken his seat, District Attorney Valentine in announcing the death of Judge Cadwalader and moving for an adjournment, said:

A most melancholy duty has devolved upon me. I am called upon to announce to your Honor the death of the Hon. John Cadwalader. He died yesterday at his residence in this city. One week ago last Friday he sat here in his accustomed place and in the enjoyment of his usual health. And to-day, oppressed with a sense of personal bereavement which you and I, and all of us feel in his loss, I cannot attempt to delineate those traits which adorned and dignified his character, and which, as a lawyer and judge, have rendered him distinguished. For more than fifty years he was at the bar and on the bench, and his had long since become one of the illustrious names that have given fame and reputation to the bar of this city.

In his death the bench, the bar and the community mourn the loss of an upright magistrate, a distinguished citizen, and a judge whose laborious and absorbing devotion to the law were no less conspicuous than his learning and ability. Eminent at the bar, when he came upon the bench he added dignity and importance to the court over which he presided by the ability with which he performed the professional labors cast upon him, and met and decided the important questions

which came before him in the most critical and important period of our history. For now almost twenty-one years—for he was appointed on the 24th of April, 1858—he filled the office of Judge of the District Court of the United States for this district. With what industry, with what impartiality, with what ability, with what integrity, with what courtesy and kindness, with what a wealth of learning, with what a profound knowledge of the law he discharged his high duties, not only you, sir, but the whole bar can witness. No case was too trivial for his careful and thorough investigation; none too intricate for his keen and quick perception. No prisoner was too lowly for his thoughtful care; none too high for the administration of impartial justice.

The language of that tablet which commemorates the virtues of a most eminent judge* of this Court is equally applicable to him. For he was alike distinguished for simplicity of manners and purity of heart. Fearless, dignified and enlightened as a judge, no influence or interest could touch his integrity or bias his judgment. He leaves to his professional brethren a spotless fame, and to his country the learning, labor and wisdom of a long judicial life.

As a testimonial to his worth, and as a mark of respect to his memory, I now move that this Court stand adjourned until Thursday next.

In reply, Judge McKennan made the following remarks, to which he afterwards referred upon taking his seat as Chairman of the Bar Meeting:

The sorrow which the event just announced has caused will not be confined to the family in which Judge Cadwalader was cherished with such tender and appreciative affection; it will extend throughout a wide circle of friends who have been drawn to him by the magnetism of his kindly nature and his great personal worth; and it will be profoundly felt in this community, of which he was so long regarded as a distinguished and useful member. But it is *here* that his loss will be

* Judge Bushrod Washington.

especially felt. For almost twenty-one years he occupied the "place of judgment" in this court. His advancement to it was a fitting recognition of his eminent position at the bar; but it only transferred him to a more congenial sphere for the conspicuous exhibition of the scholarly culture, the rich treasures of learning, and the peculiar ability by which he had before been distinguished. How often have we been admiring witnesses of his classical accomplishments, of the extent and versatility of his knowledge, and the facility with which he could command it in practical administration, of the alertness of his faculties, of the acuteness of his understanding, and of the exhaustless fullness and suggestiveness of his mind. While he insisted upon his own methods of administration, and adhered to his convictions with great tenacity, his sense of justice was supreme, and in the attainment of it neither pride of opinion nor personal consideration ever for a moment embarrassed him. Scrupulously conscientious and diligent in the performance of every public duty, as well as every private obligation, his probity commanded unquestioning and universal confidence. But his whole character was crowned with the benignity which irradiated his countenance, and was inbred in his nature. It inclined him to quick forgetfulness of personal injury, and rendered him incapable of deliberate unkindness to others. If he thought he had wounded the sensibilities of any one, no false delicacy withheld him from a prompt reparation of the unintended wrong. In the spirit of true charity, which conceals from the left hand what the right hand does, its favorite indulgence was in deeds of unostentatious private benevolence. With all these qualities of judicial and personal excellence, after a long life of useful labor, of whom can it be more fittingly said:

"Life's fitful fever o'er, he sleeps well."

We will all miss him from his accustomed place. The public will feel the loss of an upright, faithful and capable judge. His official assistants can never forget him as their ever-thoughtful adviser, and in all his intercourse with them as a

courteous and considerate gentleman. To those of us with whom the burden of judicial responsibility still remains, his loss is irreparable. We have lost the help of his ripe learning and wise counsel, upon which we have been accustomed to rely, the man we could always trust, and the friend we most sincerely loved.

PROCEEDINGS OF THE BAR MEETING

Held on Tuesday, January 28th, 1879, at 12 o'clock noon, in the United States District Court for the Eastern District of Pennsylvania

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The meeting was called to order by United States District Attorney Valentine, on whose motion Hon. William McKennan, of the United States Circuit Court, was called to preside. George Harding and George Tucker Bispham, Esqs., were selected Secretaries.

Judge McKennan, upon taking the chair, simply said that at another place he had spoken his feelings concerning the death of Judge Cadwalader, and he would therefore give way for others who were to say a word in memory of the departed.

Isaac Hazlehurst, Esq., in offering the resolution, said:

It is too soon, Mr. Chairman, nor indeed am I able, to speak of the loss that the bar and the community have suffered in the death of Judge Cadwalader. I doubt if it can be ever realized to the extent to which it must continue to be deplored. But what all men, without difference or dissent, were agreed to say of the living, may without fear or impropriety be repeated of the dead.

For twenty years he administered a difficult and complicated jurisprudence in a court famed alike for the learning and integrity of its magistrates, and where an enduring record commemorates the virtues and the wisdom of a great judge.

But not the lettering on marble, nor *any* tribute of praise, can be trusted with the sacred keeping of his fame. To those of us who knew him, his memory is embalmed in the recollection of his dignified presence, his true courtesy, his great simplicity of character, his love of justice, and, above all, his accustomed seat—forever vacant now. The generations that are

to come after us will be taught, when they hear of Marshall and Taney and Chase, to recall one greater yet, and to remember, with honest and proper pride, that Philadelphia produced the greatest jurist of the century.

> "The nature of our people,
> Our city's institutions and the terms
> For common justice he was as pregnant in
> As art and practice hath enriched any
> That we remember."

The conventional tribute that is spoken half in charity may not be offered to him. Death only made that sacred which was already supreme; and not until men shall cease to love justice, and only when they turn away with indifference alike from the wisdom and the clemency of a most righteous judge, will they forget the illustrious jurist for whose memory these walls are now draped and this assembly gathered. I have made these remarks in the only way in which I could trust myself, as preliminary to the resolutions which I now offer:

Resolved, That we have heard with unaffected sorrow of the death of the Hon. John Cadwalader, Judge of the District Court of the United States for the Eastern District of Pennsylvania.

As a member of our bar and a member of the judiciary, he has been among us and a part of us for over half a century.

He is associated in the minds of a generation as the embodiment of that learning, that integrity and that ability which is the pride of our profession. He was a great lawyer—great, not only from his natural abilities and his aptitude for the profession, but deeply learned in every branch of it. He was proud of his profession, and kept its standard of excellence so high, by his precept and example, that no one ever approached him without feeling that in the law "nothing is done as long as anything remains to be done," and that contentment with his acquisitions was but the self-delusion of ignorance.

He was not only a lawyer, but a public-spirited citizen, to whom the interests of his city, his State and his country, were a subject of constant thought and unfailing solicitude.

In his domestic relations no one was more attractive. His well-informed mind, his gentle nature, and his gracious courtesy rendered him acceptable in every circle.

The loss of such a man we may well deplore, and though our profession may hope in the future to enroll in its ranks many distinguished names, we cannot hope to find in any one, in a higher degree, the virtues of a man and the excellences of a lawyer.

Resolved, That a committee of five be appointed by the Chair to convey to the family of the deceased a copy of these resolutions, together with the sincere condolence of the bar for the loss they have sustained.

Charles Gibbons, Esq., said:

Mr. Chairman: Lord Campbell, in his life of Eldon, says that among his qualifications for the judgment seat must be reckoned his fine temper and delightful manners. What was true of Lord Eldon in this respect may be said emphatically of Judge Cadwalader. From my own experience and observation, extending through the whole period of his judicial career, I cannot now recall a discourteous word that ever escaped his lips during the argument or trial of a cause before him. While he always maintained the dignity of the bench, he never, in his manner toward counsel, assumed that air of stern authority and lofty superiority which are sometimes made to represent the purity of the ermine and the majesty of the law. His considerate kindness to the younger members of the profession and the interest he took in their honorable success may be mentioned in this connection as a fine outgrowth of his amiable nature. I think I may say that there is no lawyer at this bar who practiced in his court, and knew him well, who does not this day feel the sting of sorrow that always follows our final separation from a valued and honored friend.

Only a few days ago, a gentleman of this city related to me an anecdote of Judge Cadwalader so characteristic as to be worth preserving. The relator had been summoned by the

marshal to attend the United States Court as a juror, and as he had served in that capacity in the same court within the year, he thought he was entitled to be released. When his name was called, he addressed the Judge, stated his case, and claimed exemption from the duty. The Judge inquired, "did you speak to the marshal about it after you were summoned?" "I did not," replied the juror. "I did not think that necessary, and did not know that he had a right to excuse me. I suppose I am not obliged to serve two terms in one year." "Well, sir," answered the Judge, "if you had applied to the marshal he would probably have found a substitute. As the case now stands, I cannot excuse you for the term; but I will give you leave of absence for three days, and if your presence should be required after that, I will send for you." Of, course, he was not sent for; but a year afterwards the Judge met him by chance, and, taking him by the hand, said, "I have been wishing to see you for some time," and, recalling the incident, added: "I fully considered the question afterwards, and satisfied myself that you were right and I was wrong. I wish to apologize now for my refusal to grant your application, and if you desire it, I will make the proper amends in open court." Many such anecdotes might be told, illustrating, as this does, not only his habit of conscientiously considering minute and seemingly unimportant points before passing them, but his tender regard for the sensibilities of others.

In the early part of 1862, in consequence of the illness of Mr. Coffey, the district attorney, it fell to my lot by request of the Attorney-General of the United States, to represent the interests of the government in cases of vessels captured by our national ships and brought into this port as prizes. This led to frequent and almost daily intercourse with Judge Cadwalader. He was not in accord with all the measures of Mr. Lincoln's administration and entertained serious thoughts of retiring from the bench. He concluded, however, as he told me, that such a step might be construed into a desire to shirk the responsibility of public duties that those perilous times might cast upon him, and as he did not wish to have his motives

impugned, he abandoned the idea. The responsibilities came as he anticipated, and he met them with a learning and courage and devotion to duty, that no other judge of a United States Court, up to that time, had exhibited. In another jurisdiction it had been decided that the government had no belligerent rights against the Southern States, and could not blockade their ports or capture their property on the high seas. This was a blow at the national existence. After that decision, the same question was raised before Judge Cadwalader, and instead of following that precedent, he grasped the question as if it were entirely new, and was the first judge in the United States to decide, as he did, that the government had all the rights of a belligerent in the prosecution of the war, although no formal declaration of war had been made by Congress. The claimants of the property removed the case to the Circuit Court, where the judgment of Judge Cadwalader was affirmed by Mr. Justice Grier. Other New York cases were taken to the Supreme Court at Washington, and decided in favor of the government by a majority of one vote only, on substantially the same ground taken by Judge Cadwalader, Mr. Justice Grier delivering the opinion of the Court. President Lincoln could not have found in the ranks of his own party, or in all the country, a man more competent than Judge Cadwalader to deal with such questions of international law, or one who could have watched more faithfully, and enforced more fairly, every right which the government could lawfully or equitably invoke, as a belligerent. He was then, and at all times,

> "The Judge resolved, and steady to his trust;
> Inflexible to wrong, and obstinately just."

There are few men living as thoroughly versed in the science of the law, and none, living or dead, who ever administered it from the seat of judgment with more faultless integrity, or with a purer or kinder heart than John Cadwalader. This distinguished jurist and cultured gentleman is gone, but will live in heart and memory till they cease to be. You, sir, miss him to-day; and you will remember him, and miss him, and

mourn him always. When a man of his rare accomplishments passes away, he carries with him a kind of wealth that is forever lost to the world, and that the world cannot restore. Others may acquire as much learning and experience, but these cannot make up the counterpart. There are gifts of God, flowing in the blood, beating in the heart, beaming in the eye, and giving purity and sweetness to the whole character of the man, which come only by grace. As he closed his eyes for the last time, if his thoughts wandered here for a little while, visiting his vacant chair by your side, and calling up the records he has left and all the incidents of his stewardship, he found among them no act of injustice, no failure of duty, no shadow of wrong, no buried talent, nor anything that leaves a stain upon his memory, or a spot upon his soul. This is greatness.

Hon. Craig Biddle said:

I am loath to break the charm which the eloquence of the gentleman who has just addressed us has cast over us.

I am loath to touch the beautiful picture which, you, sir, in your remarks to the bar yesterday, and his contemporaries in their addresses here to-day, have drawn of Judge Cadwalader, lest with my unskillful hand I should mar its lineaments. But, sir, I knew Judge Cadwalader when I was a child, I knew him when I was a youth, studying law in his office, I knew him when he was a man in the height of his fame at the bar, and I knew him from being associated with him in an official position when he was on the bench; and I therefore claim the indulgence of the members of the bar while I say a few words of praise of the man that I loved and honored so much. There is a trite French phrase which says that no man is a hero to his *valet de chambre,* which I understand to mean that even the greatest of men, in the privacy of private life, when safe from the observation of people whose characters they respect, would do things which, if known, would be stains upon that character. Such was not the case with our deceased friend. Long and intimately as I have known him,

I never heard of his doing anything, I never heard of his saying anything, that impaired in the slightest degree the high estimation I had of his chivalrous character.

What he was as a Judge, we all know. How he adorned the bench every one of us can testify. To say that he was honest, that he had integrity, that he was a pure man, seems to me to belittle his character; it is like saying of some honored woman, that she is chaste, that she is virtuous, it might imply the possibility that she could be otherwise. There was no such possibility with Judge Cadwalader.

Among those who strove for mastery in the forensic halls, there might be some whose minds may have been for a time soured by adverse decisions; yet in the discussion of it afterward there was never a suggestion made by any human being, either client or counsel, that his judgment was not pure, that there was any unworthy motive in him; wrong as they considered it, no one thought for a moment of impugning his integrity.

But, sir, he has gone from us. That noble face, upon which we have looked so long and revered so much, will be seen no more forever. But, sir, his name will be cherished, in the words of your resolution, as long as manly qualities and professional excellence are honored among men.

Richard C. McMurtrie, Esq., said:

My first acquaintance with the deceased was at the time he was preparing for the case of the Girard will, and a mere accident brought us together. I had accidentally seen a passage buried in a mass of rubbish that I thought bore upon the case, and I called his attention to it. It was received as I think no other man at the bar ever received such acts, and brought us together and produced something of an intimacy.

I wish to point out one or two traits I observed in the man. His capacity we all know; I believe there has never been any difference of opinion at the bar as to the extent of his learning. I believe he has always been reckoned to be the most learned man in our profession; I have never heard any one

differ on that subject. The peculiarity was his readiness to impart it to those to whom it was useful. There was no boy at the bar that could not count upon having as much patience and attention given to his difficulties and efforts to solve difficulties, and upon having pointed out the true standpoint upon which the cause should be looked at, as if he had been the employed counsel in the cause; and I think there was not one of my own age and of those who are a little younger, who at that period were starting in life, and who were in the habit whenever they found that they had exhausted the books, and they could see no light, and could not reconcile apparently conflicting decisions, but was in the habit of going to that man, and then it was, as my friend Charles Biddle used to say, that he should be consulted. If we went to him absolutely ignorant of the subject, he rendered it obscure, for he assumed, that what was to be found in the books we already possessed, and, unless we had got that far, what he had to say certainly was difficult to understand. But when we had fairly exhausted our own capacity and what the books give, and came then and pointed out what were the apparent difficulties, I have never seen any one that seemed to possess the power of reconciling, of pointing out the true mode of looking at things, and comprehending what it was that the Courts intended to say, as he did.

There was one point which he never failed to reiterate to us, and the value of which I have never failed to experience, and that is the mode of reading decisions. Instead of taking them as if they were a piece of manufactured truth which had never existed before, and was made for the occasion, he recognized that they are all expressions of the practical application of eternal truths, and that however much they might err, there was on one side the intention of applying a rule that was known to exist, but perhaps misapplied. But the inversion of this cardinal rule which is the common notion where there is an apparent decision contrary to what is supposed to have been settled, he was forever repeating to us it is never to be presumed at all. You are to assume, he said, that the court pro-

fesses to enforce the rule; whether they have correctly understood it or correctly applied it, is a matter of very small consequence; the eternal rule is there, and therefore we can safely disregard the mere fact of blunder of application or blunder in comprehension.

As to his capacity as a jurist, there was a remark made by one whose opinion we all know to be entitled to be ranked among the very highest, that is, Judge Grier, when the case that many here may remember, the case of Winter *v.* Ludlow, came up. I think it is interesting as illustrating the current of mind of the man. He was one of the few men bred in Pennsylvania, thoroughly appreciative of the distinction between law and equity, and the absolute impossibility of running the two systems into one.

That case had been preceded by four very expensive, serious litigations in the State Courts, and the litigants were driven out of the State Courts with expressions almost of ridicule. They tried their hands, then, in the United States Courts, and Judge Grier, whom we all recognized to be a jurist of a very high order, confessed from the bench that the right of the complainant was clear, but he professed for two successive years his utter incapacity to perceive on what possible ground it could be enforced.

Judge Cadwalader then came on the bench. The cause was argued before him, and, with the aid of his knowledge of equity jurisprudence, and by suggesting simply the addition of one party, he made the thing so clear that there has never been a question or a doubt from that time to this on the subject; and it is a subject which I perceive in the English Courts has grown into an actual system, known by a name as a separate, independent ground of equity jurisprudence. The proceeding is called the law of contracts *in rem* as to personal property.

As to his administration of that most difficult and practically unknown to us system of jurisprudence that was involved and brought out, as Mr. Gibbons has remarked, by the Rebellion, I believe we all know that he was the first man that was able

to put the ship upon a level keel and float it, and when he did so there never was a divergence of opinion from that time forth.

Henry Flanders, Esq., said:

Mr. Chairman: I desire, sir, to add a few brief words to what has been said, and so well said, by the gentlemen who have preceded me. Judge Cadwalader's great learning and great purity of character were known and acknowledged by all. His acquirements were profound and varied. There were few subjects of human interest that he had not carefully studied and carefully investigated. His mind was singularly penetrating, acute and discriminating. He examined every question that came before him in his judicial capacity, in all its relations and bearings, and his industry never paused until he had searched out and found out its hidden and underlying principles. His labors on that bench, sir, embraced a very wide field, and were of great public importance. His rare knowledge of international law and of diplomatic history, as connected with it, enabled him to administer the law of prize during the late war, with an ability that would have done honor to Lord Stowell and enhanced his fame.

He was a very just man. No influence of fear or favor could swerve him from the straight and narrow path of duty. Of all the men I have ever known, he was the least affected by popular clamor. In the exercise of his judicial functions, he was wholly indifferent to it.

But, sir, it was not his eminence as a lawyer or a jurist that I most care to remember or to recall, now that the grave is about to close over him. It was his qualities as a man that most strongly appealed to and most strongly enlisted our sympathies and our affections. He was so kind, so gentle, and so thoughtful of others, that no one could know him intimately and well without loving him. No doubt, in the heat and collision of forensic contests, words might fall from his lips that tended to wound, but they were always impersonal, and he was always ready to make the amplest amends, if they chanced to be taken in a different sense.

But, sir, with all his great qualities and great intellectual endowments, full of years, with the love and respect of the profession which he had so honored and adorned, he has gone from us forever. And, sir, neither the departing nor the coming generation is likely to look upon his superior in the extent of his legal acquisitions, in the sensitive rectitude of his nature, in the tone and elevation of his sentiments, and in those gentler morals that engage the affections and impart a charm to life.

Morton P. Henry, Esq., said:

It has been suggested to me that in regard to one branch of the law, which was with Judge Cadwalader a specialty, it is a duty that I owe to say some words in reference to it at this bar meeting.

The ground has been almost entirely covered by others, and indeed I may say that, standing by an unfilled grave, it is hardly the time for criticism; it is a time only to express what the effect of a character like Judge Cadwalader's has been upon the bar and community, which he has served for so long and so well. But there was a greatness in a branch of his administration of this court, which has been referred to and touched upon, which I think requires more comment than it has received at the hands of the gentlemen who have preceded me.

Judge Cadwalader succeeded to the District Court, at the time when the Admiralty jurisdiction of this Court was still fettered by the jealousy inherited from the English common law. Year by year the Supreme Court of the United States, following the lead, I think, of Judge Story, has been gradually enlarging this jurisdiction; and the English Admiralty, by statute, has been receiving the same extended jurisdiction, in what I would call the domain of enlightened common sense. To a certain extent, therefore, the questions that came before Judge Cadwalader were very new in the Admiralty Court, and I believe that he brought to it the enlightened genius of a Mansfield, and the learning and culture of Lord Stowell. But shortly after he had taken his seat upon the bench, a vaster

and graver responsibility was thrown upon this court, by the breaking out of the civil war. I think few people have ever known how great the questions were that were thrown upon this court at that time. To a certain extent they were almost new; there was the public law of the world, but since the war of 1812, there had been few questions for adjudication in this country; hampered, also, with questions of the internal relations of the United States, the law of the belligerent was supposed to conflict with constitutional restrictions protecting the rights of those who were in rebellion. Probably a more difficult subject to deal with never came before a judge. This I will say, that in this District the leading decisions, as announced, were clear; and I recollect, perfectly well, a fact, which a friend has done me the favor to verify, by reference to the Philadelphia Library, that when ill-natured comments were made in the English Parliament, on the subject of condemnations of neutral property in American Courts, and, though I cannot verify it, I think it was in reference to the case of the Bermuda; the defender of the decisions of the American Courts in the English Parliament was Earl Russell. In these decisions, I believe that Judge Cadwalader was the leading mind in the judicial districts of the United States. I believe he first cleared the questions of the difficulties surrounding them growing out of the relations of citizens with those of belligerents.

In the very first case almost that occurred, which was the condemnation of vessels in which there was a belligerent ownership accompanied with a loyal ownership, Judge Cadwalader first saw the absolute necessity of applying the public law to condemning them. I recollect it shocked me, but it was right. Without it, by the laws of war, trade and commerce with the enemy could not be restrained, and he enforced it rigidly.

I know nothing in my professional life in which I saw better displayed the capacity to judge and to deal with the highest questions, than his dealing with a question of confiscated property; the questions which arose were all of a grave character. There is a gentleman here present who was assigned

with myself by Judge Cadwalader (who manifested that absolute regard for the rights and interests of all which came before him) to argue and contend for the rights of the unknown owners of property seized by General Burnside's expedition to North Carolina. It was the case of The Newbern Seizures. It was a case that was new to all of us. The questions were of the largest magnitude. I think I may safely say that when the counsel, after weeks of preparation, came before Judge Cadwalader, he led and instructed the counsel whose duty it had been to inform the court.

Returning to the Admiralty side of the court I think we can pronounce him as accomplished a commercial lawyer as ever sat upon the bench. For one branch of the business I think he absolutely had a distaste—the law of collision. His mind was constituted more peculiarly for abstract reasoning, and wherever abstract reasoning came in he was a master. Unfortunately his decisions have not been generally vindicated by opinions. The decree is the opinion. I think I know and can state the reason for this. In the first case that came before him, the case of the "Cambridge," in which I was counsel, a question of charter party, his decision was a monument of industry; it was a treatise on the subject; you could take it as a brief for all future reference. A great deal of labor of a kind so exhaustive in its character induced him to forego the delivery of opinions, but latterly, I can point out almost the last case I argued before him, a case of one of the most doubtful questions of the law of averages—a question whose subtlety I know had puzzled the most accomplished adjusters; in a passage of not more than thirty lines, he so beautifully settled the case that it received the assent of all classes before whom it came.

But what we now care for, as we stand by his open grave, is his character; what that was, all know. I recall him now as I first knew him. He ornamented the profession not merely by his learning, but by all the graces of life. Those who recall the beautiful hospitality of his house remember that refinement which was simplicity itself. That generous encouragement

that he gave to the young men coming to the bar, I never shall forget. I would say of Judge Cadwalader that the highest praise his successor may hope to receive is that his mantle shall properly fall upon him.

David W. Sellers, Esq., said:

Mr. Chairman: I entertain no hope that I can add to what has been said. But as Mr. Cadwalader was my preceptor, I should like briefly to advert to some things which I conceive were peculiar to him. In the first place, Mr. Chairman, he believed in the law; he believed that the exhaustive consideration of any question and its patient disposition by the court was the best method of establishing doctrines for the protection of a community. But I conceive in his entire judicial career it never occurred to him to interfere with the natural power of counsel in the development of their causes, or to hurriedly and hastily get through a list. He felt that what was positively well done in the court, was in its negative influence throughout the community bound to have its greater usefulness and scope. Mr. Cadwalader was exceptionally conscientious in assuming the relation of preceptor and pupil. He entertained the view that the profession of the law was a learned profession, and ought to be maintained in that character. Those who sought to read under his direction he preferred at the time they commenced their study that they should be well informed, and up to the standard of attainment which a person of that age should have, and it was his regret to see men come to the bar who had not a varied culture to maintain it, as I think he believed it to be, the first of all professions, excepting none.

I entered his office in 1851. Every Tuesday evening for three years and three months, meeting him at about seven and a-half o'clock in the evening until about eleven, we had what I might here call a communion on professional subjects. He would take up the statute of uses and go through many cases, and their effects on modern conveyances, and what was its necessity in the English law. He would upon many nights discuss

questions of common law pleading, in which he had the greatest reliance, as the best method of reading as to rights and remedies. He would give nights to chancery pleading, with which he was as familiar as a child with its primer, talking upon every subject, so that there never was a night in which you did not carry away a positive acquisition of knowledge that would endure for your life.

I think that if the views of Mr. Cadwalader relative to bringing young men up to the profession of the law were generally accepted, our profession would be leading in every city, and would not, as I fear it now is, be in danger of losing its influence with the commercial, the mechanical and the other industrial classes of the community.

I wish to say here one thing as to a view of Mr. Cadwalader, which it is perhaps well to record. He was personally of the opinion that the danger to this country and its institutions was in the judiciary; that in a popular country a judiciary with unlimited powers in the interpretation of constitutions was a great danger. Its errors and its abuses of power were almost beyond the hope of reversal. He regretted the amendments of all constitutions of our State which limited the power of the Legislature to instantly correct what might be thought abuses of power by the judiciary, which he thought in time would gather more power than they ought to have. I think he entertained the view to his death that in a popular country, particularly in the organization of the States, that legislative power should have few limits, and that the judiciary should be confined to well defined and proper limits. I merely state that as one of the subjects upon which I have frequently heard him speak. I agree with those who have said that we will be pleased if his mantle shall fall upon one who is his equal, and that it will fall upon no man who is a superior we all may sincerely believe. I second heartily every sentiment of the resolutions offered at this meeting.

Joseph A. Clay, Esq., arose and related an instance of Judge Cadwalader's generous conduct in extending aid to him

when by misfortune in business, his property had been suddenly swept away, and he stated that for whatever success he may have achieved at the bar and in his professional career, he was indebted to Judge Cadwalader.

The question was then put upon the resolutions and they were adopted.

On motion of Henry M. Watts, Esq., seconded by Thomas J. Diehl, Esq., it was resolved that the members of the bar attend the funeral of Judge Cadwalader in a body, and that they meet for that purpose at 10 o'clock, the following day in the United States District Court room.

The committee appointed under the last resolution consisted of Isaac Hazelhurst, Henry Flanders, Charles Gibbons, Esqs., Hon. Craig Biddle, and R. C. McMurtrie, Esq.

The meeting then adjourned.

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ADMIRALTY.

1. When danger has been incurred in rendering a salvage service, if the owners of a vessel which has rendered it, proceed in their own names and behalf, and not on behalf also of the salvors, to recover a salvage compensation, a decree will not, in general, be made for an amount greater than the owner's quota of the whole salvage. *The Arcole*, 199.

2. The rule is, in general, the same, when actual danger has not been incurred; if the vessel, in rendering the service, has deviated from her course, or her voyage has been delayed. *Ib.*

3. But when a salvage service, not attended with danger, has been rendered by a vessel, without any such deviation, or delay, her navigators are ordinarily not entitled to participate in the distribution of the compensation. *Ib.*

4. Therefore, the owners of a steam tow-boat and wrecker, so built and equipped for winter service as to securely resist the impact and pressure of ice, may, in general, sue alone for, and recover the whole salvage compensation for such relief and assistance to other vessels as may be rendered by her in the regular course of her employment. *Ib.*

5. That such a steamer has not incurred any danger in rendering the service, and has performed it with ease, if her exemption from danger has been consequent upon her particular construction and equipment, and the ease of its performance has been due to the great power of her engine, will not ordinarily diminish the amount of salvage compensation to which her owners are entitled. *Ib.*

6. The criterion to determine whether the assistance rendered has been a salvage service, is, that it has afforded relief from actual or probable danger, distress, or extraordinary difficulty. *Ib.*

7. If towage alone has afforded such relief, it should be compensated as a salvage service. *Ib.*

8. When a vessel has been engaged for the service of another vessel needing assistance, the circumstances existing at the date of such engagement, as well as those existing when the assistance is afterwards rendered, should be considered in defining the character of the service as salvage or otherwise. *Ib.*

9. Work, however arduous, performed with a view to rendering salvage relief, is not salvage unless its result has been successful, or beneficial. *Ib.*

10. When the work of a salvor, performed in successive stages, and only suspended at intervals between them, has been ultimately beneficial in its

result, the whole, from the commencement, is ordinarily compensated as a single continuous or connected salvage service. *Ib.*

11. But this rule does not apply when such continuity of the service has been interrupted. Therefore, when an intended salvage service has been abandoned at the end of an unsuccessful stage of the work, and has been afterwards recommenced and prosecuted successfully, if any compensation is decreed for the former unsuccessful work, it is not measured by the standard of a salvage recompense. *Ib.*

12. The rule that a salvor cannot enforce a bargain as to his compensation which was made with a party requiring his aid at a time of danger or distress, is not always a sufficient preventive of extortion by salvors. Attempted extortion may sometimes constitute such misconduct as to cause a forfeiture or diminution of salvage compensation. Cases may occur in which the bare mention, at the time of peril or difficulty, of the rate or amount of compensation expected will constitute a species of extortion cognizable in a Court of Admiralty. *Ib.*

13. Exorbitancy in a salvor's demand of compensation made after the service has been successfully rendered usually affects only the question of costs. It will not ordinarily prevent him from recovering them, unless there has been a tender on behalf of the party benefited by the service of a reasonable amount of compensation. *Ib.*

Damages for the detention of a vessel occasioned by injury from collision should be the net freight or hire of a vessel while in her customary employment, to be ascertained by an average of the market rates of such employment within certain limits; or by the mean of the rates attested to by witnesses as having been received. Such damages are not speculative. *The Major Reybold v. The Telegraph*, 224.

1. When a ship at sea was on fire, and there was no hope of saving her, a transfer was made by her captain of all things in her belonging to her owners that could be saved, as a compensation to the navigators of another vessel for receiving himself and his crew with their own personal effects on board of the latter vessel. This transfer conferred upon the navigators of the latter vessel no property in things which they saved from the burning vessel, belonging to her owners. *Miller and others v. The Martines Dias*, 226.

2. The arrangement was of no effect as an agreement for a salvage compensation. Such an appropriation of the *whole* of her owners' property that might be saved was repugnant to the nature of salvage. *Ib.*

3. The arrangement was unreasonable if not extortionate; and viewed in connection with subsequent endeavors to take advantage of it, which manifested an entire disregard of the rights and interests of the owners of the things saved, might have precluded the recovery by the captain of the vessel whose company saved them, of any share of salvage compensation to which he would otherwise have been entitled. *Ib.*

4. A claim of salvors for compensation ought in this case, to have been prosecuted, on arrival at the first port where it could have been conveniently brought before an established tribunal of maritime jurisdiction. *Ib.*

5. The vessel whose company saved the things, having arrived, in posses-

sion of them, at a port where such a tribunal was established, and where no adequate reason prevented a prosecution of the claim, omitted to prosecute it there, and carried the things saved to her home port which was remote from this first port of arrival and also from the known place of ownership of the things saved. Her mate and others of her crew, claiming salvage under proceedings instituted at her home port, it was held that, as her master and owners could not, under such circumstances, have recovered, the mate, though one of those who had boarded the burning vessel, could not recover. He was an officer whose capacity to institute and prosecute, independently of the captain, legal proceedings at an intermediate port of a voyage was recognized by law, and, therefore, was not exempt from the operation of the rule which would have been applicable to a claim at the suit of the master or owners. *Ib.*

6. The rule thus applicable to the master, owners, and mate was applied against subordinate navigators who did not leave their own vessel. An exemption in their favor could not be admitted on any principle on which exceptions from the rule would not be inconveniently multiplied. *Ib.*

7. But a partial exemption was allowed, and a limited salvage compensation decreed in favor of such of her subordinate mariners as had boarded the burning vessel. *Ib.*

8. A libel at the suit of these mariners against the things saved from the lost vessel, and against the master of their own vessel, presented a subject of admiralty jurisdiction, compounded of that exercised in salvage cases and that exercisable for ascertaining the ownership and preventing the misappropriation of property saved or found at sea. *Ib.*

9. But, under such a libel process was not awarded against their own vessel or against her owners. *Ib.*

10. When owners of property (other than a vessel) in custody of the Court are absent and not represented, though the property may be liable to some deterioration from its retention, a sale of it will not be ordered unless it is absolutely perishable, or so chargeable as not to be worth preserving. *Ib.*

11. The price obtainable at a peremptory judicial sale being usually much below the fair value of the thing sold, such a sale is not legally regarded as a test of its value. An absolute sale, therefore, of property in the Court's custody will not be ordered before adjudication unless the probable deterioration in value from retention exceeds the proportion which the probable sacrifice bears to the fair value. *Ib.*

1. A seaman questioned the propriety of an order of the mate, but offered no resistance to its execution, whereupon the mate struck him a blow on the temple with a belaying-pin. *Held,* that under the Act of Congress of 3d March, 1835, malice might be inferred from such a blow. *United States v. Lindsay & Cunningham,* 260.

2. Ordinary work about a vessel, although severe, is not in the nature of cruel and unusual punishment when ordered by a master to be performed by the seaman who had recently received the blow, even though such work may have a tendency to aggravate the wound, unless the intention of punishment be apparent. *Ib.*

1. A judicial sale of a vessel is never a fair test of her value. *Rutter, Newhall & Co. v. The Ferris & Cargo*, 293.

2. Where she can be restored to a navigable condition, and enabled to resume her voyage with her cargo on board, the award of a fixed sum to the salvors is always preferable to the award of a proportion of the proceeds of a future judicial sale; and the amount of the award should be estimated with a view to the probability of its being raised without an admiralty sale, and, in some cases, with regard to the probability of its being raised by way of bottomry or hypothecation. In cases of salvage prompt redemption of the property is encouraged, both in the earlier and ulterior stages of them, in the practice of permitting pecuniary deposits to secure the salvage money. *Ib.*

Where the remote cause of collision between two vessels was an improvident deviation from the track by one of them, the vessel so deviating is alone liable for the injury which may result, even if, in the confusion produced by the deviation, error be committed by the other vessel and it participates in the immediate cause of injury. *The Hehn v. The Anthracite*, 298.

1. In the case of a mere aquatic excursion of pleasure for a trip which is to end at the port of departure, a simple breach of contract between passengers and a navigator for their transportation, is not cognizable by a court of admiralty under the Constitution, where process in *rem* is asked for. *Woolston v. The John A. Warner*, 337.

2. The libel should show that the voyage is one which brings the contract within the jurisdiction. *Ib.*

A vessel in a voyage from Glasgow to Philadelphia, having sustained serious injury from storms, put into the port of Fayal, where money for repairs was raised on bottomry on the vessel and cargo. She was afterwards sold at public sale on a lien for seamen's wages. Her cargo was also judicially sold. *Held:*

1. That the owners of the cargo as between themselves and the owner of the vessel in paying their respective portions were paying money which he should have paid, they being sureties for his debts, but that their relations did not affect the rights of the bottomry creditor. *Dabney v. The Mary Holland*, 339.

2. That as among the respective owners of the cargo—the ship being a general ship—their contributory proportions of the amount to be paid should be the ratios, not of the proceeds of the judicial sales, but of the respective market values in Philadelphia ten days after the vessel's arrival; although the case being one of deficiency, the amounts payable in distribution must be determined by the results of the judicial sales. *Ib.*

1. When, through civil war against an established government, its courts of justice are closed in certain districts in which its laws cannot be enforced peaceably, hostilities for the restoration of its authority may be prosecuted in such modes as are lawful in foreign wars against public enemies. *The General Parkhill*, 479.

2. When, in the prosecution of such hostilities, a naval capture has been made of a merchant vessel, which is afterwards libelled as prize, no

resident within such hostile district can sustain a proprietary claim of restitution. *Ib.*

3. The President cannot make rules concerning captures on land and water. The Constitution has vested this power in Congress. *Ib.*

A merchant vessel was fitted out during the civil war in the island of Chincoteague, a dependency of the State of Virginia, but then virtually in the occupancy of the United States, and the inhabitants of which were reputed loyal. *Held,* that the case was to be distinguished from The General Parkhill, and that such vessel was not prize of war. *The Elizabeth Ann,* 511.

Examination of persons captured in alleged prize vessel. How directed when they have not been sent to the place of adjudication. *The Albion,* 513.

1. The general rule in prize cases is to disregard such claims as fall within the definition of liens. *The Alice,* 514.

2. But where there was an equitable lien on three-fourths of the vessel for purchase-money in favor of persons who from a period anterior to the civil war had continued in the exclusive and notorious possession and control of the vessel and who were residents of non-hostile States, so much of the vessel as was represented by the lien is not confiscable. It is otherwise as to the remaining one-fourth which was owned by a resident of a hostile State. *Ib.*

3. The order of sale may be moulded to the circumstances of such ownership, and the relative perishableness of the vessel from deterioration and daily accruing charges. *Ib.*

1. A vessel belonging to loyal owners, captured by enemies at sea, and again recaptured, continues to be the property of her former owners subject to the operation of the charter party; but she is also within the admiralty jurisdiction of the Court and, therefore, liable to the ascertainment of claims for salvage. *The Enchantress,* 525.

2. After the capture, upon the appearance of the recaptors, a mariner, one of the original crew who had been retained on board, threw himself into the sea and conveyed information which led to the recapture. *Held,* that he was entitled to salvage. *Ib.*

When the seizure is on land the burden of proof of hostile ownership and of destination to a hostile district, is on the United States. *The U. S. v. Horses,* 531.

1. In prize cases it is the duty of the naval captors who send a vessel into port for adjudication to send also a sufficient number of the persons taken in her, including, in ordinary cases, the master and mate, for examination. *The Salvor,* 531.

2. When captured vessels are brought into port, the care and custody of prisoners and persons brought in for examination, is not judicial. It is military and not civil unless they are charged with a criminal offence and surrendered under it. *Ib.*

3. Duty of prize masters. *Ib.*

4. Special order when cargo is perishable from different causes. *Ib.*

1. During the civil war the United States were not at war with litera-

ture; therefore, books shipped by a resident of a hostile district, but not for commercial purposes, were not liable to confiscation as prize. *The Amelia*, 541.

2. Persons sent in a prize ship for examination are not subject to the order of the Court. The principle of "The Salvor," (*ante*, p. 531), affirmed. *Ib.*

3. The destination of a vessel was to a blockaded port; but the voyage was undertaken in ignorance of the blockade, and no attempt was made to violate it. *Held*, that the vessel and cargo were confiscable so far only as they belonged to enemies of the United States. *Ib.*

4. Non-claim for a period of more than eight months from the capture, with the absence of proprietary documents, justifies an order of sale for the unclaimed portions of the cargo. *Ib.*

5. Formula of decrees. *Ib.*

When a discretion to order the sale of a vessel may be exercised, an hypothecation may be ordered. *The Cecile*, 547.

1. In a general national war between independent governments the hostile character of vessels must be the same whether the voyage has been begun before or after the commencement of the war. But this is not invariably true in the case of a civil war. *The Meaco and other prize cases*, 548.

2. In such a war where the voyage was begun previously to hostilities an equivalent for wages may be allowed out of a fund which would not have existed if the voyage had not, so far as the mariners are concerned, been substantially completed. *Ib.*

3. The question of wages can seldom arise in a prize court. *Ib.*

4. An allowance out of the proceeds of the cargo may be made to subjects of a foreign power, not residents of the United States, except for commercial purposes, for advances made and charges incurred by them, when the legal title to said cargo is in such persons, as security for said advances, etc. *Ib.*

1. An advance of money to a crew in lieu of wages entitles the lender to substitution against the vessel, but not to reimbursement, unless the mariners perform their duty and the vessel earns her freight. *The James Lamon*, 552.

2. A claim for expenses in bringing in the crew may stand on a different footing. *Ib.*

Speedy condemnation and sale of vessel and perishable cargo, her hostile character being evident and no claimant having intervened. *The E. Waterman*, 554.

1. The falsification of the destination of a vessel in her clearance at the port of departure should be ruled by the law of war, and is cause for her condemnation: so also, when the master in the preparatory examination made false statements for the purpose of deception as to ownership. *The Herald & Cargo*, 555.

2. Where there is actual knowledge of an intended blockade during civil war a vessel is confiscable as for its violation where its port of departure is

within the domestic jurisdiction. *Quære.* When the port of departure is within a foreign jurisdiction. *Ib.*

3. Indulgence in matters of practice in prize cases. Rights of foreign owners. Allowance of a year to prosecute their claims. *Ib.*

Libel in personam on a charter party. Plea to the jurisdiction overruled. *Hendall v. John Mason & Co. (The Caroline A. White)*, 560.

1. Under a contract of affreightment, containing no provision that the payment of demurrage shall depend upon the earning of freight, demurrage for extra detention at an intermediate port of an entire voyage becomes absolutely due at such port, and is recoverable though the vessel is lost in the return voyage. *The Caroline A. White*, 561.

2. The legal application of a word should always be uniform unless a necessary reason for modifying its application can be shown. *Ib.*

3. Advances on account of freight are recoverable when no freight is earned. It is otherwise as to payments. *Ib.*

1. Among property taken from a prize vessel and sent in for adjudication, was certain private correspondence of a political nature, thought to be of value to the government. It enclosed bills of exchange. *Held*, that the bills of exchange should remain in judicial custody, and that the whole of the correspondence, including such parts as, although unimportant, showed only personal connection with the more important, should be sent to the Secretary of the Navy for transmission to the State Department. *The Calhoun & Cargo*, 568.

2. The vessel in this case was not sent in for adjudication, but detained in the service of the United States. An appraisement of it was made under the authority of the captors, and the officers of the Navy Department which was transmitted to the Court. *Held*, that no claimant having intervened and assented to the substitution of the appraisement, the Court had no jurisdiction to receive the amount thereof and adjudicate thereon at the suit of the United States. *Ib.*

A vessel which keeps the channel has a right to infer that her movement is seen by a vessel leaving her wharf, and that such vessel would not attempt to put back, but would continue her course and cross her bow. The admiralty rule of dividing the loss does not apply to such a case. *The May v. The Reybold*, 572.

Breach of existing blockade. Condemnation and sentence. *The Guide & Cargo*, 574.

Blockade. Fraudulent destination of vessel. Destruction of papers. Condemnation. *The Lacriolla & Cargo*, 575.

Blockade. Ownership of vessel and cargo in the same persons. *The Providence & Cargo*, 577.

Captured vessel containing powder. Injury by detention. Appointment of commissioners. *The Emilie & Cargo*, 579.

Blockade. Condemnation. *The Rowena & Cargo*, 580.

Review of Acts of Congress relating to fees and distribution in prize cases. *The Lodona*, 582.

A falsification of actual destination which was to a blockaded port, is ground for confiscation. *The Intended & Cargo*, 589.

Capture on the high seas. Hearing upon claims. Confiscation. *The Fanny Lee & Cargo*, 590.

Directions to assessors in the ascertainment of facts in relation to alleged violation of blockade. *The Elmira Cornelius & Cargo*, 609.

1. Proof that an alleged destination is pretended, with absence of papers, is ground of condemnation for violation of blockade. *The Emma & Cargo*, 611.

2. A letter from the claimant of specified property of small value may, with the consent of the District Attorney of the United States, be received and filed as a claim. A liberal practice prevails in this respect in prize cases. *Ib.*

1. A vessel about midnight collided with another at anchor. The weight of testimony was that there was a light on board the anchored vessel and that the colliding vessel had not a proper lookout. *Held*, that the negligence was that of the colliding vessel which was alone responsible. *The Thomas Stanley*, 615.

2. Scope of inquiries of nautical assessors. *Ib.*

It is a rule of river navigation, that a heavily laden steam-going vessel has, in the absence of other controlling circumstances, the right to the river channel, and deviation therefrom should be made by vessels of lighter draught. *The Franklin v. The Fanny McHenry*, 638.

See CRIMINAL LAW.

ADVANCES.

Allowance of, in prize cases. *See* ADMIRALTY. *The Meaco* and other prizes, 548.

In lieu of wages. *See* ADMIRALTY. *The James Lamon*, 552.

On account of freight. *See* ADMIRALTY. *The Caroline A. White*, 561.

AFFREIGHTMENT.

Contract of. *See* ADMIRALTY. *The Caroline A. White*, 561.

See ADMIRALTY. FREIGHT.

AGENCY.

Of bankers and factors defined and distinguished. Commercial agency in general. *Winter v. Ludlow*, 1.

ALLEGIANCE.

See CRIMINAL LAW—TREASON. *The United States v. Greiner*, 448.

AMENDMENT.

See EQUITY.

APPRAISEMENT.

Of vessels and cargo in prize cases. *See* ADMIRALTY. *The Calhoun & Cargo*, 568.

APPROPRIATION.

Appropriations in favor of creditors and the rights and remedies thereunder at law and in equity. *Winter v. Ludlow*, 1.

A. residing and doing business in California remitted gold and bills to B. residing in Philadelphia, through the instrumentality of C. residing in New York. B. gave to A. a general letter of credit authorizing the drawings of drafts upon him. Drafts were accordingly drawn and accepted by B. to an amount larger than the remittances. B. became insolvent and, afterwards, A. B. then made an unsealed and informal assignment to D. appropriating future remittances, first, to secure any balance due him and his outstanding acceptances of A.'s drafts and, secondly, of A.'s drafts upon him at sight and on time. Information was sent by letter of this appropriation by B. to A. and it received A.'s ratification in terms extending its operation to all funds lying in B.'s hands to his, A.'s, credit. The ratification was not received or dated until after the suit was commenced. Notice of the assignment was sent to the complainants. Afterwards and before the ratification by A., B., at the instance of C., to whom B. was largely indebted, but who as regards A.'s remittances was merely an agent for their transmission to B., revoked the assignment to D. and made a new appropriation in favor of C. by whom the avails of the remittances were applied in payment of B.'s debt to him. *Held*, that the appropriation made by the assignment was valid and subsisting from its date, and constituted, in effect, one instrument with the ratification by A. *Ib.*

ARTICLES OF CONFEDERATION, 1778.

See EQUITY.

ASSESSORS.

See ADMIRALTY. *The Thomas Stanley*, 615.

ASSIGNMENT.

What constitutes assignment for the benefit of creditors and the nature of the trust thereunder. *See* APPROPRIATION. *Winter v. Ludlow*, 1.

Of literary property. Effect of in equity. *See* COPYRIGHT. *Laura Keene v. Wheatley & Clarke*, 343.

AUTHORS.

See COPYRIGHT. LITERARY PROPERTY. *Laura Keene v. Wheatley & Clarke*, 343.

BILLS AND NOTES.

Rights of holders and endorsers of bills of exchange. *Winter v. Ludlow*, 1.

Taken in prize vessel. *See* ADMIRALTY. *The Calhoun & Cargo*, 568.

BLOCKADE.

See ADMIRALTY. PRIZE.

BOTTOMRY.

See ADMIRALTY.

CARGO.

Perishable. Special order as to. *See* ADMIRALTY. *The Salvor*, 531.
In prize cases. *See* ADMIRALTY.

See ADMIRALTY.

CHARGES.

Allowance of, in prize cases. *See* ADMIRALTY. *The Meaco and other prises*, 548.

CHARTER PARTY.

See ADMIRALTY.

CIRCUIT COURT.

Jurisdiction of. *See* COURTS.
Practice in, in suits on mortgages. *See* MORTGAGE. RAILROADS.

CIVIL WAR.

Naval capture of merchant vessels whose owners are residents in districts engaged in civil war against an established government whose courts are closed therein. What modes of war are lawful. *See* ADMIRALTY. *The General Parkhill*, 479.

See ADMIRALTY.

COIN.

See CRIMINAL LAW. *The United States v. Bricker*, 195. *Same v. Daniel & Wm. B. Tarr*, 473.
See APPROPRIATION. *Winter v. Ludlow*, 1.

COINAGE.

See APPROPRIATION. *Winter v. Ludlow*, 1.

COLLECTOR.

See REVENUE.

COLLISION.

See ADMIRALTY. DAMAGES.

CONDEMNATION.

See ADMIRALTY.

COMMISSIONERS.

See ADMIRALTY.

CONGRESS.

Delegation of its powers. *See* MILITARY SERVICE. *Antrim's Case*, 617.
See CONSTITUTIONAL LAW.

CONSCRIPTION.

See MILITARY SERVICE.

CONSTITUTIONAL LAW.

Power to make rules concerning captures on land and water, wherein it resides. *See* ADMIRALTY. *The General Parkhill*, 479.

Constitutionality of Act of Congress of 3d March, 1863, relating to military service. See MILITARY SERVICE. *Antrim's Case*, 617.

Constitutionality of delegation of its powers by Congress. *Ib.*

See ADMIRALTY. *Woolston v. The John A. Warner*, 337.

COPYRIGHT.

A party asserting her literary proprietorship of an unprinted comedy, under an assignment to her by its author, complained of its theatrical representation by the defendants, without her consent. It had been composed in England for performance at a London theatre. Difficulties of adaptation preventing its performance there, it was thrown back on the hands of the author. He, subsequently, not being a citizen, or a resident of the United States, for a valuable consideration, transferred his proprietorship of it for the United States to the complainant, a resident of New York, where she was the proprietor and manager of a theatre. She adopted measures for securing a copyright; and, in so doing, performed all such acts prescribed by statutes of the United States as were performable without a publication in print. The play, under her management, was adapted to representation at her theatre, with the assistance of an actor of her company, to whom the principal character was allotted; and, in the course of this adaptation, received written additions, underwent curtailment, and was otherwise altered. The additions were made or suggested by this actor. The play, as composed in England, or as thus altered, was never printed. As altered and adapted, it was publicly represented at the complainant's theatre. Here, the same actor, in performing the principal character, introduced, with a view to stage effect, some unwritten additions, relying for the repetition of them, upon his memory alone. The representation at the complainant's theatre having been successful, the defendants, proprietors, and managers of a theatre at Philadelphia, afterwards performed the play, against her will, at their theatre, imitating closely the general and particular performance of it, as it had been represented by her. They had witnessed its performance at her theatre; but this, whatever assistance it may have afforded them, was not the means of enabling them to represent it themselves. They obtained the contents of the English manuscript from a former copy, which had been unauthorizedly retained, or made, by a player at the London theatre for which it had been composed. The additions, written and unwritten, were, without the permission of the com-

plainant, communicated to them by the same actor who had, under her management, introduced them at her theatre. It was *Held:*

1. That as the author was a non-resident alien, the complainant, though herself a resident of the United States, could not, as proprietor of the play, sustain her suit upon the statutes of the United States for the protection of authors and their assigns. *Laura Keene v. Wheatley & Clarke*, 343.

2. But, independently of this legislation, the Court, having, through the citizenship of the parties, a general equitable jurisdiction in the case, the suit was sustained. *Ib.*

3. The foreign author's assignment, if to be deemed a partial one, was, *at law*, inoperative, except as a license; but, having been for a valuable consideration, was, *in equity*, valid, as an assignment, for the United States, of such literary property as could exist in his composition. *Ib.*

4. The play never having been published in print, the complainant, as its literary proprietor, could have sustained her suit if she had not herself represented it theatrically before an indiscriminate audience. *Ib.*

5. A publication, literary or dramatic, may be limited or general. It is general, whenever the communication effecting it is not restricted, both as to the persons to whom, and the purpose for which, it is made. When general, it is a dedication to the public for such unlimited uses, including all modes of publishing and republishing, as it may be the means of directly or secondarily enabling any person to make. The complainant's prior performance of the play at her own theatre was a general publication. Therefore, if it had been the means of directly or secondarily enabling the defendants to represent it through a retention of its words in their own memory, or in that of others of her audience, her literary proprietorship could not have been so asserted as to enable her to maintain her suit. *Ib.*

6. But the literary proprietorship of an author and his assigns continues after a general publication, except so far as it may be the means of enabling others to make ulterior publication, or otherwise to use the composition published. Therefore, as the complainant's prior public performance of the play was not the means through which the defendants were enabled to represent it, her suit was maintainable on the foundation of literary property, notwithstanding such prior performance. *Ib.*

7. The written additions to the former manuscript were not independent literary productions, but *accessions* whose proprietorship was incidental to that of the principal composition. *Ib.*

8. Had this been otherwise, their literary proprietorship would have been in the complainant, and not in the actor who conceived and suggested them when he was in her service assisting her in adapting the drama to its intended first performance. His relation to her, as his employer, precluded him from acquiring, under such circumstances, an independent interest of his own in such products of his mental exertion in her service. *Ib.*

9. His *unwritten* additions were not capable of being the subjects of literary proprietorship in anybody. But, independently of any question of proprietary right, the complainant, having the advantage of her priority in the performance of this play, and being engaged in a professional competition in which the retention of this advantage would have been profitable

to her, his communication to her professional rivals and competitors of the written, as well as unwritten, additions, was a breach of confidence on his part, from which a Court of Equity would not permit the defendants to derive an advantage to her prejudice, or to retain an advantage thus derived. *Ib.*

10. The additions, written and unwritten, and the incidental curtailments and alterations, having been the means by which the play, as a whole, was adapted successfully to dramatic representation, this equitable doctrine was, independently of any question of literary proprietorship, applicable to the whole play as acted by the complainant, and imitated by the defendants, including the former composition to which the additions were adapted, so far as it was retained. *Ib.*

See EQUITY.

CORRESPONDENCE.

Private correspondence, taken in prize vessel, to whom to be sent. *See* ADMIRALTY. *The Calhoun & Cargo*, 568.

COUNTERFEITING.

See CRIMINAL LAW. *The United States v. Bricker*, 195.
Same v. Daniel & W. B. Tarr, 473.

COURTS.

Process and jurisdiction in equity of the Federal Courts. *Winter v. Ludlow*, 1.

Courts of the U. S. to be open but their police to be maintained. *U. S. v. Jeremiah Buck*, 312.

Jurisdiction of State and Circuit Court in suits on mortgages. *See* MORTGAGE. *Knapp v. The Chester Valley Railroad Co.*, 460.

Equitable jurisdiction of Circuit Court to protect authors and their assignees. See JURISDICTION. *Laura Keene v. Wheatley & Clarke*, 343.

CRIMES.

See CRIMINAL LAW.

CRIMINAL LAW.

When the purpose and act are otherwise guilty within the statute, the similitude suffices to justify conviction if, according to the mode of use apparently designed, the counterfeit piece would have had a probable tendency to mislead persons whom it might be intended, in *this manner*, to defraud into a belief of its genuineness. *The United States v. Bricker*, 195.

1. Under an indictment for forgery evidence of kindred transactions may be introduced to illustrate or establish the intent. *The United States v. Vondersmith*, 243.

2. A jury in a criminal case may judge of the law as well as of the

fact; but it is the office of the Court to expound the law to the jury who have, in general, no other standard of law which, as good citizens, they can desire to follow than the opinion of the Court. *Ib.*

3. Several papers and parts of papers necessary in the establishment of a claim for pension, were forgeries uttered in support of a claim wholly fictitious. *Held*, that a general description of their character and object as one paper is not insufficient or inaccurate. *Ib.*

4. A designation of a forged paper as "a certain writing" is sufficient even in a case where the indictment is under a statute in which the instrument is named. *Ib.*

5. It is not a valid objection to an indictment in a forged attestation to pension papers that it is not the entire paper, but a part only, the effect of the whole being stated by way of inducement. But where there is another indictment alleging the paper as a whole, the defendant cannot be convicted on both. *Ib.*

6. The forging of the name of the appointor to a power of attorney and afterwards filling in the name of the appointee, constitutes the offence of procuring a forgery as distinguished from forgery. *Ib.*

7. The limitation of a prosecution for forgery in the Act of Congress of 30th April, 1790, is two years, within which time an indictment must be *found* or an information *instituted*, exclusive of the period during which the defendant may have fled from justice. *Ib.*

8. Where the defendant's flight occurred on the same day of the same month as the performance of his last act in the forgery two years before, the prosecution would be barred, except where by comparison with other periods of limitation in the same act it appeared to be the intention of the legislature to include within them the last day. *Ib.*

Punishment of seamen, when within Act of Congress of 3d March, 1835. *See* ADMIRALTY. *The United States v. Lindsay & Cunningham*, 260.

Mail matter and express matter were in the same car. An intent to commit robbery in the car was proved against the prisoner, but the act was frustrated: *Held*, that the intent must be referred to both kinds of matter. *The United States v. Jackson*, 271.

Mutiny on shipboard. Act of 3d March, 1835, in relation thereto. Degree and justification of means for suppression. Effects of the abolition of flogging, and review thereof. The practice of employment of seamen on shore without inspection by master or other officer, condemned. Payment of wages in advance, condemned. *The United States v. Thomas Dodd*, 273.

Shortly before the late revolutionary secession of Georgia, a volunteer military company in her service, by order of her governor, took possession of a fort within her limits, over which jurisdiction had been ceded by her to the United States, and garrisoned it until her ordinance of secession was promulgated, when, without having encountered any hostile resistance, they left it in the possession of her government. A member of this company, who had participated in the capture and detention of the fort, afterwards visited Pennsylvania at a period of threatened, if not actual, hostilities between the confederated States, of which Georgia was one, and the United

States. He was arrested in Pennsylvania under a charge of treason. *U. S. v. Charles A. Greiner*, 448.

1. It was held that if the courts of the United States for Georgia had been open, or if there had been a reasonable probability that they would soon be able to exercise their jurisdiction, the accused should, upon the charge of treason, have been committed, under the 33d Section of the judiciary Act of 24th September, 1789, to stand his trial in the Circuit Court of the United States for the Southern District of Georgia, which Court alone could have jurisdiction of the case. This Act of Congress would then have required that a warrant should be seasonably issued for his removal to that district by the marshal. Such a warrant of removal was not asked for on behalf of the United States; and it was admitted that their courts for Georgia were not open, and were not likely to be able to exercise their jurisdiction within any definable period. Under such circumstances, the Constitution and laws of the United States gave no authority to commit the accused, or to require him to give bail to answer the charge of treason, at an uncertain future day in Georgia. *Ib.*

2. But though his immediate purpose in visiting Pennsylvania was apparently neither belligerent nor treasonable, the motive of his visit was, on account of his prior hostile relations to the United States, liable to just suspicion. He was required, therefore, to give security to keep the peace, and be of good behavior in all cases arising under the Constitution and laws of the United States. *Ib.*

3. When a body, large or small, of armed men is mustered in military array for a treasonable purpose, every step which any one of them takes, by marching or otherwise, in part execution of this purpose, is an overt act of treason in levying war. *Ib.*

4. Their occupation of a fortress, in order to take it from the dominion of a government to which they owe allegiance, is treason in every one of them concerned in the capture, or subsequent detention of the post, though they may encounter no hostile resistance in the capture or the detention. *Ib.*

5. A private soldier, or subordinate officer, serving under the command of a military superior, cannot excuse a treasonable act on the ground of compulsion, unless he was forced, under a personal fear of death, into the service, and quitted it as soon as he could. *Ib.*

6. This doctrine applies wherever, and so long as, the duty of allegiance to an existing government remains unimpaired. Though a revolution is impending, the allegiance continues to be due, so long, at least, as the courts of justice of the government are open to maintain its peace, and afford the citizen that protection which is the foundation of his duty of allegiance. *Ib.*

7. The accused owed a twofold allegiance, to the United States, and to the State of Georgia. His duty of allegiance to the United States was co-extensive with the jurisdiction of their government, and was, to this extent, independent of, and paramount to, his duty of allegiance to the State. It continued to be thus paramount so long, at least, as the Courts of the United States could exercise their jurisdiction within the State. Though these Courts have been closed since the capture of the fort, there was, at

its date, no such conflicting enforced allegiance to the State, as made him a public enemy of the United States, in contradistinction to a traitor. *Ib.*

8. The provision of the Constitution that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court, is inapplicable to preliminary hearings and commitments. *Ib.*

1. If persons are engaged in making counterfeit coin in the house of one who, knowing their guilty purpose, has procured, or facilitated its execution by harboring them in the house, he is, under the 20th Section of the Act of Congress of 3d March, 1825, guilty of *assisting* in making such coin. *The United States v. Daniel & Wm. B. Tarr*, 473.

2. On the trial of a person indicted for this offence, after proof that counterfeit pieces of coin, and certain machines, implements and materials were found in his house in places where they probably could not have been unseen by him, a detective police officer testified that his observation in many other cases in which he had arrested persons in places where counterfeit coins had been found, enabled him to know the purpose to which such machines, implements and materials could be applied. The witness was rightly allowed to testify that they could all be used in making such coin, and that although each one separately might be otherwise used, there was, in his belief, no other use to which they could collectively be applied. *Ib.*

3. The house had been demised to the defendant for a month, and afterwards from month to month, at a certain monthly rent, payable in advance. On signing the lease he paid a month's rent and received the key of the house. Ten days afterwards the house was discovered to have been used by persons engaged in making counterfeit coins. From this time it was vacated, and remained unoccupied until the end of the month. At the end of the month—the defendant not having been as yet arrested—an unknown person brought the same key which the defendant had received to the same place at which he had received it, and returned it there to the same person from whom he had received it. This having been proved without objection, proof that the bearer of the key said, on returning it, that he was directed to leave it there, was admissible. *Ib.*

A merchant vessel belonging to citizens of the United States was captured by an armed vessel sailing under a commission of the Confederate States as a privateer. She was afterwards recaptured and brought with the defendant, who was one of the original captors and had been placed on board of her as prize master, in the first instance into Hampton Roads. After a detention there of several days, they were brought into the port of Philadelphia, where the defendant was committed for trial on the charge of piracy. On the trial the Court charged the jury:

1. That an established government may prosecute hostilities against its enemies in a civil war in like modes as against its foreign enemies in a national war; but that the results of a civil war do not alter its legal character and the enemies of the established government may, when captured, be liable to prosecution in its courts of justice as traitors or pirates. *The United States v. William Smith*, 516.

2. Humane usages in the treatment of such persons, however com-

mendable, are not, in a civil war, founded in any rules of absolute legal right; but are measures of governmental policy. *Ib.*

3. Privateering is recognized by the law of nations; but the commission of a revolutionary government whose existence is not recognized by that of the United States, can confer no such authority as will change the legal character of piracy.

4. Where the revolutionary government has for a definite period been maintained in peace, it may be a question whether a resident under its dominion may not be exempted from criminal responsibility. *Ib.*

5. Compulsion to operate as a defence for the accused, must be actual force or such threats and intimidation, as placed him personally under a reasonable fear of death or bodily harm. The mere existence of an act of legislation of the revolutionary government under whose authority he resided, requiring military or naval service under pain of banishment or confiscation of property, is not such compulsion. *Ib.*

6. Under the Act of 1820 a person first brought into one district, and afterwards apprehended in another, may be tried in the latter district. *Ib.*

On an application for a continuance in a prosecution for an offence committed at sea, it is not necessary that the affidavit should set forth the evidence. *The United States v. Perry and others*, 536.

See ADMIRALTY. EXTRADITION. GRAND JURIES. HABEAS CORPUS.

CURRENCY.

See APPROPRIATION. *Winter v. Ludlow*, 1.

DAMAGES.

For detention of vessel occasioned by injury from collision. *See* ADMIRALTY. *The Major Reybold v. The Telegraph*, 224.

DECREES.

See COPYRIGHT. *Laura Keene v. Wheatley & Clarke*, 343.
In ADMIRALTY. *See* ADMIRALTY.

DEMURRAGE.

See ADMIRALTY. *The Caroline A. White*, 561.

DRAFT.

See MILITARY SERVICE.

DRAMA.

Copyright in dramatic productions. *Laura Keene v. Wheatley & Clarke*, 343.

DUTIES.

See REVENUE.

EQUITY.

Nature and effect of the answer in equity practice. *Winter v. Ludlow*, 1.

Discovery. *Ib.*

What interest of a party requires that he should be made a defendant in equity in the Federal Courts before final decree. *Ib.*

Effect of an interest acquired by complainants subsequent to filing bill upon proceedings to bring in as a new defendant, the party through whom such interest had been acquired. *Ib.*

Original bill in the nature of a supplemental bill, when proper. *Ib.*

Process of the Federal Courts, its scope, and to whom it should be directed. *Ib.*

At the time of filing the original bill, A. was a resident of California. He afterwards became a resident of the Western District of Pennsylvania. He was not made a party to the bill. On this ground objection was made to the entering of a final decree. *Held*, that under the Act of Congress of 28th, February, 1839, the objection was well taken; that as a resident of the Western District he was amenable to process in a suit in equity directed to the marshals of both districts, and that under the circumstances of the case, the complainants having acquired a new or modified interest by his act of ratification performed after the filing of their bill, he could not be brought upon the record by mere amendment; but the correct practice was by an original bill in the nature of a supplemental bill in which he was named as defendant. *Ib.*

See APPROPRIATION. *Ib.*

In equity, an amendment of the bill, when allowed after answer and replication, does not open the pleadings unrestrictedly. The Court looks back through them in order to ascertain to what extent, if any, the amendment may have introduced a new case, or new matter; and, in general, considers them as open to this extent, but no farther. *Laura Keene v. Wheatley & Clarke*, 343.

An amendment of the bill, after answer, does not sanction the introduction on the part of the defendant, by way of plea, of an allegation of a personal disability in the complainant as having existed at the commencement of the suit. The answer itself would overrule such a plea. *Ib.*

Effect in equity of an assignment of literary property. *See* COPYRIGHT. *Ib.*

See JURISDICTION. *Ib.*

Equitable remedies in the Circuit Court of the United States in suits on mortgages and how regulated. *See* MORTGAGE. RAILROADS.

EQUITY OF REDEMPTION.

See MORTGAGE.

EVIDENCE.

In a criminal case the jury *can* judge of the law as well as the facts. But where they cannot know the law otherwise than as it may be stated

by the Court their duty is to believe that the Court states it correctly. *U. S. v. Jeremiah Buck*, 313.

No special artistic, professional or scientific experience is required in order to make an expert as to the subject of his testimony. *The United States v. Daniel & Wm. B. Tarr*, 473.

See COUNTERFEITING. CRIMINAL LAW. *Ib.*

See EXAMINATION.

EXAMINATION.

Return of persons in prize cases for examination. *See* ADMIRALTY. *The Albion*, 513. *The Salvor*, 531. *The Amelia*, 541.

EXTRADITION.

1. The treaties between the United States and certain European States for the mutual extradition of fugitives charged with certain crimes, do not require that an application for extradition shall have been preceded in the country of the government making it, by a charge, or public accusation, of equivalent effect with an indictment. *Traugott Müller's Case*, 631.

2. It suffices that there has, within the jurisdiction of the country making the application, been an authorized proceeding under which evidence has been, or might lawfully have been, taken there, with a view to a criminal prosecution, or to deciding whether to institute one. *Ib.*

3. Depositions preliminarily taken there with such a view should, if certified according to the Act of 22d June, 1860, or otherwise duly attested, be admitted in evidence if they would be receivable in evidence there in support of a charge of a crime cognizable under such a treaty. *Ib.*

4. The crimes are named in the treaties with reference to known definitions in the system of general jurisprudence. But the specific applications of the definitions are determinable in particular cases, by the jurisprudence and legislation of the respective places of arrest. *Ib.*

5. In the United States, the jurisprudence and legislation must, under a charge of the forgery of a private writing, be those of the State of the Union in which the arrest is made. *Ib.*

6. The application for extradition may be sustained under a law of the State enacted after the date of the treaty, but in force at the time of the commission of the offence, and at the time of the hearing under the application. *Ib.*

7. A discharge of the accused party, under a previous application for extradition upon the same charge, heard in another State, does not preclude the renewal of the application, where the case does not appear to have been fully investigated and considered under the former proceeding. *Ib.*

FEDERAL COURTS.

See COURTS.

FEES.

In prize cases. *See* ADMIRALTY. *The Lodona*, 582.

EQUITY.

Nature and effect of the answer in equity practice. *Winter v. Ludlow*, 1.

Discovery. *Ib.*

What interest of a party requires that he should be made a defendant in equity in the Federal Courts before final decree. *Ib.*

Effect of an interest acquired by complainants subsequent to filing bill upon proceedings to bring in as a new defendant, the party through whom such interest had been acquired. *Ib.*

Original bill in the nature of a supplemental bill, when proper. *Ib.*

Process of the Federal Courts, its scope, and to whom it should be directed. *Ib.*

At the time of filing the original bill, A. was a resident of California. He afterwards became a resident of the Western District of Pennsylvania. He was not made a party to the bill. On this ground objection was made to the entering of a final decree. *Held*, that under the Act of Congress of 28th, February, 1839, the objection was well taken; that as a resident of the Western District he was amenable to process in a suit in equity directed to the marshals of both districts, and that under the circumstances of the case, the complainants having acquired a new or modified interest by his act of ratification performed after the filing of their bill, he could not be brought upon the record by mere amendment; but the correct practice was by an original bill in the nature of a supplemental bill in which he was named as defendant. *Ib.*

See APPROPRIATION. *Ib.*

In equity, an amendment of the bill, when allowed after answer and replication, does not open the pleadings unrestrictedly. The Court looks back through them in order to ascertain to what extent, if any, the amendment may have introduced a new case, or new matter; and, in general, considers them as open to this extent, but no farther. *Laura Keene v. Wheatley & Clarke*, 343.

An amendment of the bill, after answer, does not sanction the introduction on the part of the defendant, by way of plea, of an allegation of a personal disability in the complainant as having existed at the commencement of the suit. The answer itself would overrule such a plea. *Ib.*

Effect in equity of an assignment of literary property. *See* COPYRIGHT. *Ib.*

See JURISDICTION. *Ib.*

Equitable remedies in the Circuit Court of the United States in suits on mortgages and how regulated. *See* MORTGAGE. RAILROADS.

EQUITY OF REDEMPTION.

See MORTGAGE.

EVIDENCE.

In a criminal case the jury *can* judge of the law as well as the facts. But where they cannot know the law otherwise than as it may be stated

by the Court their duty is to believe that the Court states it correctly. *U. S. v. Jeremiah Buck*, 313.

No special artistic, professional or scientific experience is required in order to make an expert as to the subject of his testimony. *The United States v. Daniel & Wm. B. Tarr*, 473.

See COUNTERFEITING. CRIMINAL LAW. *Ib.*

See EXAMINATION.

EXAMINATION.

Return of persons in prize cases for examination. *See* ADMIRALTY. *The Albion*, 513. *The Salvor*, 531. *The Amelia*, 541.

EXTRADITION.

1. The treaties between the United States and certain European States for the mutual extradition of fugitives charged with certain crimes, do not require that an application for extradition shall have been preceded in the country of the government making it, by a charge, or public accusation, of equivalent effect with an indictment. *Traugott Müller's Case*, 631.

2. It suffices that there has, within the jurisdiction of the country making the application, been an authorized proceeding under which evidence has been, or might lawfully have been, taken there, with a view to a criminal prosecution, or to deciding whether to institute one. *Ib.*

3. Depositions preliminarily taken there with such a view should, if certified according to the Act of 22d June, 1860, or otherwise duly attested, be admitted in evidence if they would be receivable in evidence there in support of a charge of a crime cognizable under such a treaty. *Ib.*

4. The crimes are named in the treaties with reference to known definitions in the system of general jurisprudence. But the specific applications of the definitions are determinable in particular cases, by the jurisprudence and legislation of the respective places of arrest. *Ib.*

5. In the United States, the jurisprudence and legislation must, under a charge of the forgery of a private writing, be those of the State of the Union in which the arrest is made. *Ib.*

6. The application for extradition may be sustained under a law of the State enacted after the date of the treaty, but in force at the time of the commission of the offence, and at the time of the hearing under the application. *Ib.*

7. A discharge of the accused party, under a previous application for extradition upon the same charge, heard in another State, does not preclude the renewal of the application, where the case does not appear to have been fully investigated and considered under the former proceeding. *Ib.*

FEDERAL COURTS.

See COURTS.

FEES.

In prize cases. *See* ADMIRALTY. *The Lodona*, 582.

FIRE INSURANCE.

See INSURANCE.

FLOGGING.

Effects of the abolition of, on shipboard, and review thereof. *The United States v. Thomas Dodd*, 273.

FORECLOSURE.

Remedies as to, in the Circuit Court of the United States and in the Courts of Pennsylvania. *See* MORTGAGE. *Knapp v. The Chester Valley R. Co.*, 460.

FORFEITURE.

See REVENUE. In re *Thomas Mellor & Co.*, 334.

FORGERY.

See COUNTERFEITING. CRIMINAL LAW. *The United States v. Bricker*, 195.

Of Pension Papers. *See* CRIMINAL LAW. *The United States v. Vondersmith*, 243.

See EXTRADITION.

FRANCHISES.

Sale of. *See* RAILROADS.

FREIGHT.

See ADMIRALTY.

FUGITIVE SLAVES.

Constitutionality of Act of Congress of 18th September, 1850. Identification. Alteration in certified record. *The United States v. Moses Horner*, 311.

A fugitive slave, having been brought by the marshal, under a warrant of arrest, before the Circuit Court, the case was heard, and a certificate, whose contents were comformable to the requirements of the Act of 18th September, 1850, authorizing his removal to the State from which he had escaped, was delivered to the claimant. The claimant having afterwards made an affidavit that he apprehended a rescue, the marshal retained the fugitive in custody, placing him in charge of certain deputies, or assistants, who, when engaged in removing him, were obstructed by the defendant. The acts of obstruction constituted, or included, an attempt to rescue the fugitive from custody. When this occurred, neither the claimant, nor any private person as his agent, was present. *Held:*

1. That for the purpose of the removal of the fugitive, and for incidental purposes, the certificate had established conclusively the relation of the claimant to the fugitive to be that of a proprietary master to his servant; that the subsequent custody of the marshal was lawful only in consequence

of the master's affidavit, and might have been terminated by him at any time; that if it had been thus terminated, or had been interrupted, or had never taken effect, the right of custody would have been in the master alone; that the marshal's custody, while it continued, was not incompatible with any reasonable intervention, control, direction, or participation of the master in which the marshal might acquiesce; but that the custody, unless actually assumed by the master, was, through his affidavit, continued in the marshal, in the same official character in which he had held the fugitive under the warrant of arrest; that the defendant might, therefore, have been indicted under the 22d Section of the Act of 30th April, 1790, for obstructing the marshal as an officer; but that he was liable also to indictment under the 7th Section of the Act of 18th September, 1850, for the attempt to rescue from the custody of the marshal and his assistants. *The United States v. Jeremiah Buck*, 312.

2. Under an indictment for such an attempt, the prosecution may be maintained without the adduction of any independent evidence that the fugitive owed service or labor, and had escaped from the State in which it was due. *Ib.*

3. Such an indictment contained averments of the issuing of the warrant of arrest, and of the subsequent proceedings, including the certificate and affidavit. These averments were preceded by allegations that the fugitive had escaped, and that he owed, in the State from which he had escaped, service or labor, to the claimant. *Held*, that the enactments of the law of 18th September, 1850, as to the conclusiveness of the certificate, rendered these preceding allegations matters of mere inducement, and that, the certificate having been produced in evidence, no independent proof of them was required in order to sustain the prosecution. *Ib.*

4. Such a prosecution is not maintainable unless the defendant acted "knowingly and willingly." But his only ignorance that can excuse him is ignorance of the existence of the custody or of its lawfulness. Where he might, upon inquiry, have readily known the truth, his omission to inquire is evidence from which his actual knowledge of the truth may be inferred. This is particularly the case where the custody is official. *Ib.*

5. A Court of the United States ought never to sit with its doors of entrance closed, so as to prevent publicity in its proceedings. But, its police must be maintained. Where the Court has not prescribed any general rule, or made any special or particular order on the subject, the specific duty of the marshal to maintain and regulate its police according to law is an incident of his general duty to attend the Court. When, during the pendency of a particular proceeding, there is reason to believe that an unrestricted admission of persons of a known class or association would endanger the security of the administration of justice, or, in any manner prevent the police of the Court from being properly maintained, the marshal, without excluding absolutely such persons as a class, may adopt prudential measures to prevent their indiscriminate admission, regulating the exercise of his discretion so that their exclusion is not carried beyond the exigency of the particular occasion. *Ib.*

GRAND JURIES.

1. A principal purpose of the Act of Congress of 16th August, 1856, conferring upon the Courts power to discharge grand juries, is to limit disproportionate expense. *A. J. Antelo's Case*, 470.

2. A presentment should be definite in form, with specifications. *Ib.*

HABEAS CORPUS.

1. The discharge of a person under confinement accomplishes the purpose of a writ of habeas corpus, and the expression of opinion as to the sufficiency of the reasons for the detention would be out of place. *The United States*, ex parte *Charles Ingersoll*, 587.

2. The official character of the person to whom the writ was directed might possibly make an exception, if the case had been argued. *Ib.*

See MILITARY SERVICE.

HOSTILE OWNERSHIP.

See ADMIRALTY. PRIZE OF WAR.

HYPOTHECATION.

Of vessel, when it may be ordered. *See* ADMIRALTY. *The Cecile*, 547.

INSURANCE.

A mortgagor effects a policy of insurance against fire, which provides that the insurers' liability should cease upon an assignment of the *policy* without their consent; and that it should become void in case of the termination of the interest of the insured in the subject of the insurance. Subsequently the mortgagor makes an assignment of *all his title and interest* in the policy to the mortgagee—in *visual juxtaposition* to the policy, though without the written consent of the insurers, and a renewal is effected and premium therefor paid by the mortgagee. The mortgagor then conveys the fee to the mortgagee. *Held:*

1. That the Court properly instructed the jury that if the existence of the assignment was known to the insurers, the act of renewal included the consent required by the policy. *Bilson v. The Manufacturers' Ins. Co.*, 264.

2. That the assignment to the mortgagee only operated as an equitable transfer of the policy, and that the approval of the assignment by the insurers did not convert his contract into a *new* one for the independent insurance of the mortgagee. *Ib.*

3. The transfer of the property to the mortgagee, so as to divest the mortgagor's (the plaintiff's) interest, has the same effect as if the conveyance had been made to some third person other than the mortgagee, there being, in both cases, a change of interest in the subject of the insurance. (Grosvenor *v.* The Atlantic Mut. Ins. Co., 3 Smith, 391 N. Y., and the State Mut. Ins. Co. *v.* Roberts, 7 Casey, 440, Pa.—approved.) *Ib.*

JUDICIAL SALES.

Of vessels. *See* ADMIRALTY.
Of cargo. *See* ADMIRALTY.

JURISDICTION.

In admiralty of libel at suit of mariners for salvage against things saved from a lost vessel and their own master. *See* ADMIRALTY. *Miller and others v. The Martinez Dias*, 226.

In prize cases of substituted appraisement of the value of vessel, not sent in for adjudication. *See* ADMIRALTY. *The Calhoun & Cargo*, 568.

Of an aquatic pleasure excursion. *See* ADMIRALTY. *Woolston v. The John A. Warner*, 337.

See ADMIRALTY.

Equitable jurisdiction of the Circuit Court for the protection of authors and their assigns. *See* COPYRIGHT. *Laura Keene v. Wheatley & Clarke*, 343. EQUITY. *Ib.*

See COURTS. *Winter v. Ludlow*, 1.

LETTER OF CREDIT.

Effect of a general letter of credit on the liability of the party by whom it is given. *See* APPROPRIATION. *Winter v. Ludlow*, 1.

LIBEL.

By mariners against things saved from a lost vessel and their own master. *See* ADMIRALTY. *Miller and others v. The Martinez Dias*, 226.

It should bring the contract within the jurisdiction. *See* ADMIRALTY. *Woolston v. The John A. Warner*, 337.

See ADMIRALTY.

LIENS.

On vessels in prize cases. *See* ADMIRALTY. *The Alice*, 514.

LIMITATIONS.

Of prosecution for forgery. *See* CRIMINAL LAW. *The United States v. Vondersmith*, 243.

LITERARY PROPERTY.

In dramatic productions, as distinguished from copyright. *See* COPYRIGHT. *Laura Keene v. Wheatley & Clarke*, 343.

EQUITY. *Ib.*

LITERATURE.

During the civil war the United States were not at war with literature. *See* ADMIRALTY. *The Amelia*, 541.

See COPYRIGHT.

MAIL.

See POST OFFICES.

MAIL MATTER.

See CRIMINAL LAW. *The United States v. Thomas Dodd*, 273.

Carriage of, within State or city limits. *See* POST OFFICE. *The United States v. Kochersperger*, 419.

MARITIME LAW.

See ADMIRALTY. CRIMINAL LAW. COURTS. JURISDICTION.

MARITIME LIENS.

See LIENS.

MILITARY SERVICE.

1. When persons who are to render military service have been ascertained by draft or otherwise, and have been lawfully commanded to attend a rendezvous, those who disobey may be subjected by military force to military discipline and organization, where legislation has not substituted a different rule. *Cornelius McCall's Case*, 591.

2. When a militiaman of a State, duly called under the Act of Congress of 17th July, 1862, ch. 201, into the military service of the United States, has disobeyed an order to attend at a rendezvous, his subjection to military discipline and organization is compellable by military force. *Ib.*

3. Militiamen of the States who are liable to be called into the service of the United States through enrollment and draft, cannot be lawfully drafted unless their names have previously been accurately enrolled. A misnomer in the enrollment prevents the person misnamed from being liable to the draft. *Ib.*

4. Legislation of the United States, both of 1792 and 1862, requiring the enrollment in the militia of the States, of all citizens between the ages of eighteen and forty-five years, but, intervening, legislation of Pennsylvania requiring the enrollment in her militia of only persons between the ages of twenty-one and forty-five years, *Quære*, whether, in Pennsylvania, a draft of militiamen, under a call from the government of the United States, made from an enrollment which omits the names of persons between the ages of eighteen and twenty-one years, is binding upon the persons drafted. *Ib.*

1. A statute which, in relation to summary proceedings before a military commission, enacts that its decision shall be *final*, does not necessarily make the decision *conclusive* as to the *right* which was in question. *Antrim's Case*, 617.

2. The provisions of the 14th Section of the Act of Congress of 3d March, 1863, ch. 75, requiring the presentation, by drafted persons, of all claims of exemption to the Board of Enrollment, and making the board's decision *final*, do not, in the case of an exempt whose claim of exemption has been duly presented to the board and disallowed, preclude the subsequent con-

sideration, under a writ of *habeas corpus*, of the question of his *right* of exemption. *Ib.*

3. *Quære:* Whether the question will be considered under such a writ at the instance of a party, who, having had proper notice and opportunity, has not presented his claim of exemption to the board, or has failed to comply with its reasonable regulations, of which he has had proper notice, or of a party who, after a rejection of such claim, and full subsequent time and opportunity to obtain an unobstructed judicial investigation of the question of alleged right, neglects to apply for the writ until after he has been mustered into military service. *Ib.*

4. The act of Congress of 3d March, 1863, for the purpose of raising national armies independent of the militia of the States is constitutional. *Ib.*

5. Congress cannot constitutionally delegate its own powers, but may confer executive and judicial power upon those respectively who are, according to the Constitution, qualified for their exercise. *Ib.*

MILITIA.

See MILITARY SERVICE.

MORTGAGE.

What constitutes consent of insurers to assignment of policy of insurance to the mortgagee. Right of mortgagee to recover in event of loss upon the assigned policy after conveyance to him in fee by the mortgagor. *See* INSURANCE. *Bilson v. The Manufacturers' Ins. Co.*, 264.

Under authority of an Act of the Legislature of Pennsylvania of 24th February, 1852, a mortgage was made for the security of railroad bonds to trustees named by the bondholders. The Act provided that a sale *under the mortgage* should pass the road property and franchises. The mortgage stipulated, *inter alia*. 1. That if the company should fail to pay the principal or interest, the trustees might take possession of the road, receive the income and after defraying charges and expenses apply the net avails in payment of principal and interest due. 2. That after the principal should fall due the trustees might, on request of the bondholders, cause the premises to be sold at auction after prescribed notices. The company having defaulted on its interest payments the first stipulation was carried into effect. Afterwards and before the maturity of the bonds, the trustees on behalf of the bondholders sought in this proceeding the aid of a Court of Equity to obtain foreclosure on the mortgage by reason of the failure to pay interest. *Held:*

1. That in the courts of Pennsylvania there could be no foreclosure of this mortgage. The only proceedings in that State on a mortgage and under which a judgment can be obtained that the mortgaged premises be sold, are given by the Act of 1705. There can be no proceeding under this Act until after the expiration of twelve months from the time when the principal of the bonds fall due. *Knapp v. The Chester Valley R. Co.*, 460.

2. The method of obtaining an earlier proceeding in that State by insert-

ing a provision in the mortgage that upon default of payment of interest the principal should be considered due, not having been resorted to in this case, it is to be inferred that it was opposed to the views of the parties. *Ib.*

3. In the absence of legislative provision, a railroad and its franchises cannot be sold under an execution, or voluntarily sold, or effectually mortgaged. *Ib.*

4. Had the act of 1852 *(supra)* simply authorized the mortgage to be made as a security for the principal and interest of the bonds, the road and its franchises would according to a doctrine peculiar to Pennsylvania have been liable to an execution under a judgment at law upon a coupon for interest in arrear. But the terms of the Act of 1825, limiting the remedy to a "sale under and by virtue of the mortgage" excludes the application of this doctrine in the absence of a proviso in the mortgage to sell in default of interest. *Ib.*

5. On the equity side of the Circuit Court, remedies are not regulated as on its law side, by the practice in the Courts of Pennsylvania. In a proper case it may extinguish an equity of redemption by a foreclosure, and its practice in such a case would, under the 90th of the rules of 1842, be regulated conformably to the practice of the English Chancery at that period. *Ib.*

6. Where, upon a consideration of the whole contract, the circumstances of the road, and the relations of the parties, it appears that the equity of redemption was intended to be guarded against extinction at any period before the principal becomes due, a Court of Equity will not declare it forfeited. *Ib.*

7. It might, where the state of facts justified it, intervene to secure the subject of the security from irretrieveable ruin, on the footing of necessity. *Ib.*

MEETING.

On ship board. *See* CRIMINAL LAW. *The United States v. Thomas Dodd*, 273.

NEGLIGENCE.

See ADMIRALTY. COLLISION.

ORDER OF SALE.

In prize cases. *See* ADMIRALTY.

How moulded to meet circumstances of ownership and perishableness of vessel. *See* ADMIRALTY. *The Alice*, 514.

OWNERSHIP.

Of vessels and cargo in prize cases. *See* ADMIRALTY.

PIRACY.

When arising in civil war. How considered in courts of law and as a question of governmental policy. *See* CRIMINAL LAW. *The United States v. William Smith*, 516.

POST OFFICES.

1. The business of private carriers of letters and mailable packets, even on principal mail routes, is lawful, unless legislatively prohibited. *The United States v. Kochersperger*, 419.

2. The government's monopoly cannot be extended beyond the legislative prohibition merely because the continuance of a specific business which has not been prohibited would reduce the postal earnings of the government, or even frustrate the purposes of its exclusive policy. *Ib.*

3. The constitutional power to establish state roads as post roads, can be executed only by the designation of actual public highways, present or future, for use by carriers of the mail. The existence and continuance of such highways are independent of congressional control. Congress cannot regulate their use or secure their permanence. When they cease to be common public highways of the respective States, they are no longer post roads. While they are post roads, carriers of the mail use them under the same conditions as the respective States have imposed on their own citizens. *Ib.*

4. But the highways of a State, so long as they are open to the common public use of her own citizens, may be used unobstructedly by carriers of the mail, and cannot be used by private carriers of mailable matter in any mode which has been prohibited by Congress. *Ib.*

5. Public streets, intersecting a municipal town, are highways distinguishable specifically from the general public highways of a State beyond the town limits. They are within the sovereign dominion of the State, but not as part of its general public domain, as to which no just government can legislate with a disregard of local rights and interests of inhabitants of the town. *Ib.*

6. A post for the carriage of letters on a mail route is distinguishable from a local post for their collection and carriage within the limits of a mail station. *Ib.*

7. Post routes and post roads distinguished. *Ib.*

8. Post routes and post roads are not synonymous in the Postal Act of 3d March, 1851, establishing post routes within cities and towns. And as this Act contains no prohibition of the business of the private carriage of letters in the streets of a city, such business is not unlawful, and is not made so by the Act of 2d March, 1827, which applies only to post roads. It is otherwise as to mailable matter where the streets are used as established post roads between mail stations. *Ib.*

9. The word "places" in the Act of 3d March, 1845, construed not to mean points within the limits of a mail station or postal district. Therefore, the business of the defendants was not within the prohibition contained in that Act. It was neither a private *post* within the meaning of the Act of 1827, nor a private *express* within the Act of 1845. *Ib.*

POST ROADS.

See POST OFFICES.

POST ROUTES.

See POST OFFICES.

PRACTICE.

As to suits on mortgages in the Circuit and State Courts. *See* MORTGAGE. *Knapp v. The Chester Valley R. Co.*, 460. RAILROADS. *Ib.*

As to continuance in the prosecution of an offence committed at sea. *See* CRIMINAL LAW. *The United States v. Perry and others*, 536.

Indulgence in matters of practice in prize cases. Allowance to foreign owners of a year in which to prosecute their claims. *See* ADMIRALTY. *The Herald & Cargo*, 555.

As to method of making claim in prize cases. *The Emma & Cargo*, 611.

PRESENTMENT.

See GRAND JURIES.

PRESIDENT OF THE UNITED STATES.

He has no power to make rules concerning captures on land and water. *See* ADMIRALTY. *The General Parkhill*, 479.

PRIVATE CARRIAGE OF LETTERS.

See POST OFFICES. *The United States v. Kochersperger*, 419.

PRIZE MASTERS.

Duty of. *See* ADMIRALTY. *The Salvor*, 531.

PRIZE OF WAR.

See ADMIRALTY.

Examination in prize cases. *See* ADMIRALTY. *The Albion*, 513.

PROCESS.

See COURTS. EQUITY.

PROPERTY.

In vessels and cargo. *See* ADMIRALTY.

PUBLIC ENEMIES.

See CRIMINAL LAW. *The United States v. Charles A. Greiner*, 448. *Same v. William Smith*, 516.

RAILROADS.

Sale of, private and under foreclosure. *See* MORTGAGE. *Knapp v. The Chester Valley R. Co.*, 460.

RENDITION OF FUGITIVES.

See FUGITIVE SLAVES.

REVENUE.

1. Upon information filed against goods alleged to be forfeited under the Revenue Collection Act of 1799, and its Suppplements, the goods pass out of the hands of the collector who seizes them into the hands of the marshal, whose custody is thenceforth that of the Court. *The United States v. Cigars*, 282. *Same v. Linens*, 291

2. No penal increase of duties can afterwards be exacted by the collector from a claimant of the goods, though such a penalty might lawfully have been imposed before the goods were seized as forfeited. *Ib.*

3. If such a penal increase has been received by the collector before the seizure, the goods, though they would otherwise have been liable to forfeiture, are exempt from such liability. *Ib.*

4. His exaction of such an increase after information filed, though an illegal act on his part, does not affect the prosecution against the goods. *Ib.*

5. Under proceedings upon a petition of the claimant for the delivery to him of the goods on his giving a bond, with surety, for their appraised value, he is to pay no greater amount of duties than would have been demandable of him if the fairness of the importation had not been impeached. *Ib.*

6. If the goods are afterwards condemned he loses the amount of the regular duties thus assessed, as well as the value of the goods forfeited. *Ib.*

7. The bond, in such a case, is a substitute for the proceeds of the goods which, if it had not been given, would have been sold by the marshal. *Ib.*

8. It must, therefore, be given for the market value of the goods at the place of seizure, without any deduction for the regular amount of duties which are thus payable at all events. *Ib.*

9. If under such a proceeding, the collector and naval officer should refuse to give a receipt, conformably to the Act of 1799, for the regular amount of duties, and require the payment of a penal excess, the Court will order the delivery of the goods to the claimant upon the execution of the bond, and payment of the proper amount of duties. *Ib.*

10. Where payment of such an excess had been exacted unlawfully by the refusal of such a receipt, and had been made under protest, the goods having been afterwards condemned, and the amount of the bond paid into court, the excess was, by the Court's order, repaid to the claimant out of the fund in Court. *Ib.*

11. A case in which such a payment has been thus made after information filed, and in the course of a proceeding under the direction and control of the Court, is not within the statutes and rules of decision applicable to other cases of duties paid under protest. *Ib.*

Remission of forfeiture of goods fraudulently invoiced. Duties of the Court and commissioner. In re *Thomas Mellor & Co.*, 334.

ROBBERY.

See CRIMINAL LAW. *The United States v. Jackson*, 271.

SALE.

Of vessel. *See* ADMIRALTY.
Of cargo. *See* ADMIRALTY.
When of property other than the vessel, when ordered and how regulated. *See* ADMIRALTY. *Miller and others v. The Martinez Dias*, 226.

SALVAGE.

See ADMIRALTY.
In relation to judicial sales of vessels and cargo; to bottomry, or hypothecation. *Rutter, Newhall & Co. v. The Barque Ferris*, 293.

SEAMEN.

The practice of employment of seamen on shore without inspection by master or other officer, condemned. *The United States v. Thomas Dodd*, 273.
Payment of wages in advance, condemned. *Ib.*
See ADMIRALTY.

SLAVES.

See FUGITIVE SLAVES.

TREASON.

See CRIMINAL LAW. *The United States v. Charles A. Greiner*, 448. *Same v. William Smith*, 516.

TREATY.

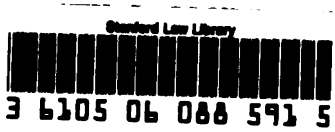
Of 1842 with Great Britain. *See* EXTRADITION. *Traugott Müller's Case*, 631.

VESSELS.

In prize cases. *See* ADMIRALTY.

WAGES.

See CRIMINAL LAW. *The United States v. Thomas Dodd*, 273.
Question of, in prize cases. *See* ADMIRALTY. *The Meaco and other prize cases*, 548.
Advance in lieu of. *See* ADMIRALTY. *The James Lamon*, 552.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